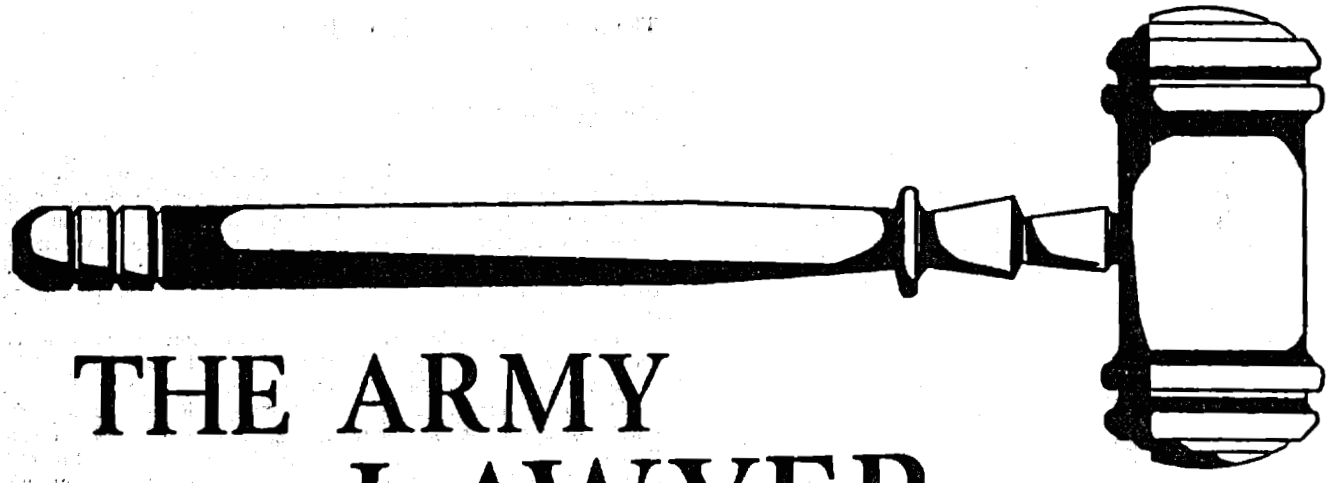

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet
27–50–155

November 1985

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The Army Lawyer (ISSN 0364–1287)

Editor
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The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. However, the opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer,* The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform System of Citation* (13th ed. 1981) and the Uniform System of Military Citation (TJAGSA, Oct. 1984). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals.*

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as The Army Lawyer, [date], at [page number]. Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903–1781.

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WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-LC 23 September 1985

SUBJECT: The Labor Counselor Program - Policy Letter 85-3

STAFF AND COMMAND JUDGE ADVOCATES

1. Since its creation in 1974, the Army Labor Counselor Program has provided specialized legal services to commanders and civilian personnel offices in the fields of labor and civilian personnel law. Effective 8 July 1985, the Director of Civilian Personnel, HQDA, required Labor Counselor coordination on all adverse personnel actions under AR 690-700, Chapter 751.

2. The importance of this program demands our renewed emphasis as the number of labor and civilian personnel cases continues to grow. To meet the requirements of the Labor Counselor Program, we must ensure that:

a. We have a well-trained and aggressive Labor Counselor to support every civilian personnel office in the Army.

b. We provide necessary personnel and resources to meet legal requirements of AR 690-700, Chapter 751.

c. Each Labor Counselor has attended the TJAGSA Federal Labor Relations course, or equivalent training, before assuming the duties of Labor Counselor.

d. To the maximum extent possible, Labor Counselor assignments are stabilized to develop a strong relationship between the civilian personnel office and the Labor Counselor.

e. Whenever possible, an assistant Labor Counselor be appointed to enhance continuity.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

The Acquisition Law Specialty Program—Where Are We Going?

Colonel Frederick E. Moss
Chief, Contract Law Division, OTJAG
and
Lieutenant Colonel Walter B. Huffman
Personnel, Plans, and Training Office, OTJAG

In the May 1985 issue of *The Army Lawyer,* The Judge Advocate General announced the establishment of an Acquisition Law Specialty (ALS) Program. This article provides more detailed information about the program.

The ALS Program "establishe[d] a centrally managed system for selecting, assigning, and training acquisition lawyers so that we as a Corps can develop the requisite expertise which our client needs."[1]

The divergent nature of service in the JAGC has placed a premium on the multi-talented attorney. Specialization in any one legal field is a potential impediment. There are fewer than 100 JAGC officers who are qualified through advanced training and experience as acquisition law specialists. An additional thirty civilian attorneys are acquisition lawyers.

Judge advocates have long been involved in installation level procurement, contract appeals, and litigation, and all levels of procurement activities overseas. Further, through the Contract Law Division of The Judge Advocate General's School (TJAGSA) and instructors at the Army Logistics Management Center, the JAGC has presented the vast majority of acquisition law instruction available to military lawyers. Since 1979, a number of JAGC captains have been assigned to three-year internship in Army Materiel Command (AMC) legal offices (where most major acquisitions are handled). This program has been successful in providing technical training and in introducing JAGC officers to the major systems acquisition process.

The Judge Advocate General has been charged by the senior leadership of the Army to become more involved in major acquisitions. To deal with the increasing complexity of government contracting at all levels, the Army staff has been restructured to provide for a Directorate for Army Contracting and Production, headed by a major general and under the overall direction of the Deputy Chief of Staff for Logistics. The congressionally-mandated Office of the Competition Advocate General has been established. The newly established position of Assistant Chief of Staff for Information Management also plays an important policy role in the acquisition of automated data processing equipment. Congress is clearly taking an active interest not only in specific major acquisitions but also in the acquisitions process itself. All of these developments combine to provide an increased need for more JAGC involvement in acquisition legal services for the Army.

To meet this recognized requirement, The Judge Advocate General, in conjunction with the Army General Counsel and the Command Counsel of the AMC, has taken the following actions:

1. *Increased TJAGSA Training:* The School has increased the number and level of acquisition law courses. In the past academic year, over 2800 lawyers received some exposure to contract law issues in resident courses or on-site instruction. Over the next year, more than 850 government contract lawyers will attend specialized resident courses, including a new course in advanced acquisition law.

2. *Increased Advanced Civil Schooling:* Beginning next year, the number of JAGC officers who may be selected annually to pursue LL.M. in government contract law will be increased from two to five.

3. *Increased JAGC Participation in Major Acquisition:* In July 1984, the Army General Counsel, The Judge Advocate General, and the AMC Command Counsel signed a Memorandum of Understanding under which twenty field grade JAGC officers will be assigned (over time) to key positions in AMC legal offices. This program will increase JAGC participation in major acquisitions, and will improve the effective use of senior JAGC contract law specialists.

In an effort to integrate these initiatives and to study the direction an acquisition legal specialty program should take, a committee was formed under the direction of the Assistant Judge Advocate General for Civil Law.[2] The committee submitted the concept described in the May issue of *The Army Lawyer* to the Judge Advocate General for approval. On 10 April 1985, Major General Clausen approved the basic concept developed by the committee and gave additional guidance for refining the program. Because elements of the program, as then designed, represented a departure from historical practices, he directed that his successor be given an opportunity to ratify the program.

On 28 August 1985, a decision briefing of a proposed implementation plan was presented to Major General

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[1] Letter, Office of The Judge Advocate General, U.S. Army, subject: Acquisition Law Specialty (ALS) Program, 27 Mar. 1985, *reprinted in* The Army Lawyer, May 1985, at 4.

[2] The committee was chaired by Colonel Ronald P. Cundick (then Chief, Contract Law Division, OTJAG), and included Colonel David B. Briggs (SJA, Ballistic Missile Defense Systems Command), Colonel Daniel A. Kile (Chief, Contract Appeals Division, U.S. Army Legal Services Agency), Lieutenant Colonel Kenneth D. Gray (Chief, Personnel, Plans and Training Office, OTJAG), and Lieutenant Colonel Joseph L. Graves (Chief, Contract Law Division, TJAGSA).

Overholt, the new The Judge Advocate General, along with the The Assistant Judge Advocate General and the Assistant Judge Advocate Generals for Military and Civil Law. The Judge Advocate General ratified the program, with some refinement, committing the JAGC to the long-term effort necessary to make the program work. He tasked the Chief, Personnel, Plans, and Training Office (PPTO), with timely implementation of this program and directed the Assistant Judge Advocate General for Civil Law to provide the necessary oversight.

Initial implementation will include the following steps:

1. Major Michael Marchand, a JAGC officer with an acquisition background, will be assigned to PPTO upon completion of the Armed Forces Staff College in January 1986 to prepare an ALS Force Model and to develop selection, assignment, and training requirements for acquisition specialists.

2. All JAGC-controlled acquisition legal positions, both military and civilian, are being identified. These positions will be reviewed for a determination of the type and level of acquisition legal skills required.

3. Appropriate positions will be documented as requiring an ALS specialist.

4. By separate message, applications for the ALS program will be invited from all JAGC officers, including those currently carrying a skill identifier (SI) in contract law.[3] The Judge Advocate General will select those to be admitted to the program and award them SIs in contract law.

ALS is a program designed to *develop* the legal skills needed by the Army in the future, not simply to identify those officers possessing requisite skills today. Of necessity, it is a long range program, likely requiring more than five years to fully implement. Changes in the program are almost certain to be required as we gain experience. The objective is to have a credible specialty program within the overall JAGC personnel management system. During the early stages of the program, it may not be possible to assure all lawyers desiring to specialize that they will be offered assignments only to ALS designated specialty positions. By the same token, we will be unable to fill immediately all ALS positions with officers who have previously served exclusively (or even predominantly) in acquisition positions. Some assignments and schooling outside of strictly ALS positions will be necessary to meet the needs of the individual or the JAGC. As the program matures, however, we would expect that an ALS officer will be assigned predominantly to acquisition law positions or in an allied field such as contract litigation, contract fraud, labor, fiscal, or patent law.

The ALS program has one goal: to help the Army accomplish its increasingly important and complex acquisition mission. To achieve this result, the ALS program not only includes enhanced training and expanded assignment opportunities for contract law specialists throughout their careers, but also includes the all important assurance from the JAGC leadership that the acquisition law specialist will receive the same career progression opportunities available to JAGC officers pursuing more traditional career patterns. That assurance means no more and no less than it says. ALS officers will not be "hurt" by participation in the program; neither will they receive guarantees. The individual career payoff in this program will be the same as for any JAGC officer: quality performance.

We plan subsequent articles in *The Army Lawyer* to keep the Army legal community informed on developments in the ALS program.

[3] Dep't of Army, Reg. No. 611-101, Personnel Selection and Classification—Commissioned Officer Classification System, table 4-1 (30 Oct. 1985). *See* AR 611-101 at page 56 for the classification guidance applicable to the Government Contract Law Specialist.

The Privilege Against Self-Incrimination of the Public Employee in an Investigative Interview

Luther G. Jones, III
Assistant General Counsel, Labor Relations Law Branch, AAFES

I. Introduction

The American employer has a well-recognized right to question employees on employment-related matters.[1] The American citizen, however, has a constitutionally protected right not to respond to questions by the government which would be incriminatory within the meaning of the fifth amendment.[2] These two fundamental rights clash when the employer involved is the government. The United States Supreme Court has attempted to resolve the conflict between these two rights by utilizing the concept of "use immunity."[3] The decisions of the courts in the formulation and application of use immunity provide some of the most interesting and academically challenging reading in public sector labor law. This article attempts to bring these cases together in a comprehensible manner by focusing on pre-interview rights, including injunctions to prevent interviews, requirements to delay disciplinary proceedings, pre-interview tenders of immunity, *Miranda* rights advisements, and the investigative interview. These pre-interview rights will be broken down into four possibilities: where the employee voluntarily talks, where the employee refuses to talk but neither asserts the fifth amendment privilege against self-incrimination nor evidences a fear of criminal prosecution, where the employee refuses to talk and asserts the fifth amendment privilege against self-incrimination or evidences a fear of criminal prosecution, and where the employee talks only after compulsion.

An employee of a government entity can assert the fifth amendment privilege against self-incrimination in employment-related proceedings.[4] This right can be traced from the earliest Supreme Court cases dealing with the fifth amendment privilege against self-incrimination. In *Counselman v. Hitchcock*,[5] the Court was called upon to determine whether the fifth amendment privilege could be raised in grand jury proceedings, *i.e.*, whether "in criminal proceedings" meant only the criminal trial itself. The Court stated, "[T]his provision must have a broad construction in favor of the right which it was intended to secure."[6] These oft-cited words follow:

> It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.[7]

In *McCarthy v. Arndstein*,[8] the privilege against self-incrimination was applied to bankruptcy proceedings:

> The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.[9]

In *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*,[10] a case involving public employees' refusing to waive their privilege against self-incrimination before a grand jury, the Court stated: "Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution including the privilege against self-incrimination."[11] More recently, in *Maness v. Meyers*,[12] the Court restated its broad declaration in *Kastigar v. United States* that the privilege against self-incrimination can be asserted

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[1] *See* Lefkowitz v. Turley, 414 U.S. 70, 84–85 (1973); Navy Public Works Center, Pearl Harbor v. FLRA, 687 F.2d 97 (9th Cir. 1982); Clifford v. Shoultz, 413 F.2d 868 (9th Cir.), *cert. denied*, 396 U.S. 962 (1969).

[2] Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 284–85 (1968). *See also* Spevack v. Klein, 385 U.S. 511 (1967).

[3] For the sequential development of the "use" immunity concept in these circumstances, *see* Spevack v. Klein, 385 U.S. 511, 529 (1967) (Harlan, J., whom Clark and Stewart, JJ., join, dissenting); Garrity v. New Jersey and Spevack v. Klein, 385 U.S. 511, 532 (1967) (White, J., dissenting); Gardner v. Broderick, 392 U.S. 273 (1968); and Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968) (Harlan, J., whom Stewart, J., joins, concurring). *See generally*, Kastigar v. United States, 406 U.S. 441 (1972); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 426 F.2d 619 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972). *Cf.* Lefkowitz v. Turley, 414 U.S. 70 (1973) (public contractor).

[4] Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968).

[5] 142 U.S. 547 (1892).

[6] *Id.* at 562.

[7] *Id.*

[8] 266 U.S. 34 (1924).

[9] *Id.* at 40.

[10] Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968).

[11] *Id.* at 284–85.

[12] 419 U.S. 449 (1975).

"in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." [13] The issue is thus well-settled by the courts. [14]

II. Pre-Interview Rights

A. Injunctions to Prevent Interviews

In general, public employees have not been successful in seeking intervention by the courts to restrain investigative interviews. [15]

In *Luman v. Tanzler,* [16] a suspended city police officer, facing criminal charges, obtained an injunction from the federal district court that prohibited the city from proceeding with disciplinary action because the police department rule requiring the waiver of fifth amendment immunity was unconstitutional. The Fifth Circuit ordered the injunction dissolved because the rule was unconstitutional; consequently, the rule could not be applied and the police officer was free of such compulsion. The court stated:

> We . . . have a *Uniformed Sanitation Men* case and under its rationale, Luman is forearmed with the fact that he cannot be discharged for refusing to testify. He no longer faces the choice of self-incrimination or job forfeiture under Rule 5.39(x).
>
> In sum, the present posture of the law, as we understand it, leaves the parties in this position. Rule 5.39(x) cannot be applied against Luman. At the administrative hearing he will have a "free choice to admit, to deny, or to refuse to answer." This is full vindication of the Fifth Amendment privilege against self-incrimination. On the other hand, defendants may conduct a hearing within the confines of the charges against Luman which relate to the performance of his official duties. [17]

In *Bowes v. Commission to Investigate Allegations of Police Corruption & the City's Anti-Corruption Procedures,* [18] four city police officers sought to enjoin a commission investigation upon a theory previously rejected by the New York state courts. Both the state and federal courts felt the action to be premature, concluding that it was "quite possible that no incriminating statements will be asked, and, thus, petitioners conceivably may never be faced with the dilemma they seek to avert." [19] The federal court stated:

> It further appears that this Court lacks jurisdiction, since (a) the Commission has not yet asked any questions; (b) the questions to be asked are not specified; (c) plaintiffs have neither testified nor invoked their privileges and refused to testify; and (d) no action to either prosecute or discharge movants has been taken. If and when such events occur, doubtless the various Supreme Court cases heretofore cited will be dispositive of the matter. However, at this stage, the Court need not, and indeed cannot, reach the merits of this action. [20]

B. Requirement to Delay Disciplinary Proceedings

There is generally no requirement to delay discipline or discharge proceedings until completion of criminal actions. [21] The rationale is simply that the public employee's fifth amendment privilege against self-incrimination is amply protected under the immunity provisions of the law. [22]

When a public employee is coerced to speak by a threat of loss of employment, any resulting statements are inadmissible in subsequent criminal actions. [23] The public employer is further prohibited from coercing a waiver of that immunity. [24] Also, when the employee is confronted with questions which may reasonably incriminate him or her, the employee may assert the privilege. [25] The employer is prohibited by the Constitution from disciplining or discharging an employee based solely upon the assertion of, or refusal to waive, the privilege. [26] On the other hand, a public employee can be required to answer questions

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[13] 419 U.S. at 464 (quoting Kastigar v. United States, 406 U.S. 441, 444 (1972)). *See also* Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

[14] *See* Gulden v. McCorkle, 680 F.2d 1070 (5th Cir.), *reh'g denied,* 685 F.2d 157 (1982), *cert. denied,* 103 S. Ct. 1194 (1983); Hoover v. Knight, 678 F.2d 578 (5th Cir. 1982); Devine v. Goodstein, 680 F.2d 243 (D.C. Cir. 1982); Diebold v. Civil Service Commission, 611 F.2d 697 (8th Cir. 1979).

[15] *See* Luman v. Tanzler, 411 F.2d 164 (5th Cir. 1969), *cert. denied,* 396 U.S. 929 (1969); Bowes v. Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures, 330 F. Supp. 262 (S.D. N.Y. 1971). *Accord Gulden v. McCorkle; Diebold v. Civil Service Commission; In re* Alleged Prohibited Political Activity Philadelphia Redevelopment Authority, Philadelphia, 443 F. Supp. 1194 (E.D. Pa. 1977); Hank v. Codd, 424 F. Supp. 1086 (S.D.N.Y. 1975); Fitzgerald v. Cawley, 368 F. Supp. 677 (S.D.N.Y. 1973). For a non-employee case, *see* DeVita v. Sills, 422 F.2d 1172 (3d Cir. 1970).

[16] 411 F.2d 164 (5th Cir.), *cert. denied,* 396 U.S. 929 (1969).

[17] *Id.* at 167 (footnote omitted).

[18] 330 F. Supp. 262 (S.D.N.Y. 1971).

[19] *Id.* at 263 (quoting the state court's holding in Fahy v. Commission to Investigate Allegations of Police Corruption, 65 Misc. 2d 781, 319 N.Y.S. 2d 242, 247 (1971)).

[20] *Id.* at 264.

[21] Hoover v. Knight, 678 F.2d 578 (5th Cir. 1982); Coalition of Black Leadership v. Cianci, 480 F. Supp. 1340 (D.R.I. 1979); Pinkney v. District of Columbia, 439 F. Supp. 519 (D.C. Cir. 1977).

[22] *See Gulden v. McCorkle; Hoover v. Knight; Pinkney v. District of Columbia. See also* United States v. Rubinson, 543 F.2d 951, 960–61 (2d Cir.), *cert. denied,* 429 U.S. 850 (1976); United States v. Parrott, 425 F.2d 972, 976 (2d Cir.), *cert. denied,* 400 U.S. 824 (1970); Gordon v. FDIC, 427 F.2d 578 (D.C. Cir. 1970).

[23] Garrity v. New Jersey, 385 U.S. 493 (1967). *See* Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), *cert. denied,* 416 U.S. 956 (1974).

[24] *Lefkowitz v. Cunningham;* Gardner v. Broderick, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation.*

[25] *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation.*

[26] *Confederation of Police v. Conlisk.*

"specifically, directly and narrowly" related to the performance of his or her official duties,[27] and may be discharged for refusing to answer such questions when answering does not require him or her to relinquish the benefits of constitutional privileges.[28] Upon answering such questions, however, the public employee has immunity from the use, including any derivative use, of such answers in subsequent criminal proceedings.[29]

Where the employee is facing both criminal and disciplinary proceedings, however, the public employee is placed in a dilemma: he or she may voluntarily testify in a disciplinary proceeding and run the risk of the use of this uncoerced testimony in subsequent criminal proceedings, or he or she may assert the privilege against incrimination and risk hindering his or her position in the disciplinary proceeding. This dilemma is, however, "constitutionally permissible,"[30] it does not rise to "constitutional proportions,"[31] and it is not an "impermissible burden."[32] Any loss of a "good impression" by failing to testify or by asserting the fifth amendment privilege against self-incrimination in such civil matters is not constitutionally proscribed.[33] The choice is not one "between the rock and the whirlpool,"[34] according to the First Circuit Court of Appeals, because the employee "can, if he wishes, stay out of the storm and watch the proceedings from dry land. But, if he does so, he forfeits any opportunity to control the direction of the current."[35] Justices Harlan and Stewart anticipated a procedural formula whereby "public officials may now be discharged . . . for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices."[36] This scenario would appear to be the formula they anticipated.

C. Pre-Interview Tender of Immunity

The public employer is not required to give the public employee an affirmative tender of immunity prior to questioning.[37] Neither can the public employee circumvent an investigatory proceeding by claiming a generalized fifth amendment concern before being required to respond to questioning.[38]

In *Gulden v. McCorkle,* two city employees were discharged for refusing to take a polygraph examination which was given to all employees after the city experienced some pranks and received an anonymous telephone bomb threat which forced the evacuation of a building and disrupted a retirement party for an employee. The two employees, Gulden and Sage, refused to take the polygraph examination, asserting the fifth amendment right against self-incrimination.

Before the federal district court and the Fifth Circuit, the employees claimed that once the fifth amendment right against self-incrimination is asserted, the public employer must make an affirmative tender of immunity prior to questioning the employees. The Fifth Circuit rejected this claim:

> We further decline to promulgate the rule, urged upon us by Gulden and Sage, that would allow an employee, before he or she is required to respond to any questions, to circumvent an investigatory proceeding by claiming generalized fifth amendment concerns prior to the time those concerns have been developed in a particularized context.[39]

The essence of the employee's claim was that even though there was no explicit requirement to relinquish the privilege against self-incrimination, an implicit requirement to relinquish was created when an employer refused to make an affirmative tender of immunity prior to questioning. The court quite correctly observed the fault in this reasoning:

> It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity. Logically then, the Defendants' failure to tender immunity has put Gulden and Sage in no more jeopardy than *Gardner, Sanitation Men* and *Lefkowitz I* and *II* allow.[40]

The failure to tender immunity "was simply not the equivalent of an impermissible compelled waiver of immunity."[41]

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[27] Gardner v. Broderick, 392 U.S. 273, 278 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation.*

[28] *Gardner v. Broderick. See* Baxter v. Palmigiano, 425 U.S. 308 (1976); Gulden v. McCorkle, 680 F.2d 1070 (5th Cir.), *reh'g denied,* 685 F.2d 157 (1982), *cert. denied,* 103 S. Ct. 1194 (1983); United States v. Shamy, 656 F.2d 951 (4th Cir. 1981); Clifford v. Shoultz, 413 F.2d 868 (9th Cir.), *cert. denied,* 396 U.S. 962 (1969); DeWalt v. Barger, 490 F. Supp. 1262 (M.D. Pa. 1980); McLean v. Rochford, 404 F. Supp. 191 (N.D. Ill. 1975).

[29] Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967). *See* Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), *cert. denied,* 416 U.S. 956 (1974).

[30] Diebold v. Civil Service Commission, 611 F.2d 697, 699 (8th Cir. 1979).

[31] Pinkney v. District of Columbia, 439 F. Supp. 519, 534 (D.C. Cir. 1977).

[32] Hoover v. Knight, 678 F.2d 578, 582 (5th Cir. 1982).

[33] DeVita v. Sills, 422 F.2d 1172, 1178 (3d Cir. 1970).

[34] *Garrity v. New Jersey,* 385 U.S. at 498.

[35] Gabrilowitz v. Newman, 582 F.2d 100, 104 (1st Cir. 1978) (student discipline case).

[36] *Garnder v. Brockerick* and *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation,* 392 U.S. at 285 (Harlan and Stewart, J.J., concurring).

[37] Gulden v. McCorkle, 680 F.2d 1070 (5th Cir.), *reh'g denied,* 685 F.2d 157 (1982), *cert. denied,* 103 S. Ct. 1194 (1983).

[38] 680 F.2d at 1076.

[39] *Id.*

[40] *Id.* at 1075 (citation omitted).

[41] *Id.*

D. Miranda *Rights*

The government employer is not required to give *Miranda*[42] rights to public employees because *Miranda* is not applicable to the employment environment. The Supreme Court has held that *Miranda* does not apply "outside the context of the inherently coercive custodial interrogation for which it was designed."[43] "Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[44] A "coercive environment" does not convert a noncustodial situation to a custodial one.[45] The Court has refused to extend this "extraordinary safeguard" to the completion of tax returns,[46] to investigations by special agents of the IRS,[47] or to criminal sentencing procedures.[48] Federal courts, following this lead, have refused to extend *Miranda* to the public employment relationship.[49]

E. *Advisements*

The origin of the advisement requirement is clouded. The authorities appear to establish such a requirement, but the rationale, timing, and even the substance of such advisements[50] are not clearly established. It is clear, however, that advisements can create the "compulsion" necessary to trigger immunity when an employee refuses to respond to questions.

There is authority which apparently supports the proposition that an advisement of some nature is required before a public employee can be questioned.[51] This authority is a short line of cases rooted in a Second Circuit decision.

In *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation,*[52] the Second Circuit interpreted the phrase "after proper proceeding," used by Justice Fortas in the last paragraph of the Supreme Court's opinion in the same case,[53] to mean proceedings in which the employee is "duly advised of his options and the consequences of his choice."[54] This interpretation was subsequently used by the Court of Claims in *Kalkines v. United States* to support its conclusion that a "sufficient warning" must be given to employees before questioning, *i.e.*, advisements of constitutional rights, disciplinary possibility for silence, and use immunity.[55] That same year, the Seventh Circuit, in *Confederation of Police v. Conlisk,* determined that a constitutional requirement existed to advise public employees

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[42] Miranda v. Arizona, 384 U.S. 436 (1966).

[43] Roberts v. United States, 445 U.S. 552, 560 (1980).

[44] Oregon v. Mathiason, 429 U.S. 492 (1977).

[45] In *Oregon v. Mathiason,* 429 U.S. at 495, the Court stated:

> Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

[46] Garner v. United States, 424 U.S. 648 (1976).

[47] Beckwith v. United States, 425 U.S. 341 (1976).

[48] Roberts v. United States, 445 U.S. 552 (1980) (an accused's refusal to identify his coconspirators or to cooperate with the police after waiving his *Miranda* rights and confessing was admissible on sentencing). *But cf.* Estelle v. Smith, 451 U.S. 454 (1981) (fifth amendment was violated where an accused was not warned of his *Miranda* rights at a pretrial psychiatric evaluation which was offered into evidence at sentencing).

[49] *See* Womer v. Hampton, 496 F.2d 99 (5th Cir. 1974); DeWalt v. Barger, 490 F. Supp. 1262 (M.D. Pa. 1980); Boulware v. Battaglia, 344 F. Supp. 899 (D. Del. 1972), *aff'd mem.*, 478 F.2d 1398 (3d Cir. 1973). *See also* United States v. Mandujano, 425 U.S. 564 (1976) (rights referred to in *Miranda* may be incorrect in employment environment).

[50] The advisement used by city officials of the City of New York in Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 426 F.2d 619, 621 (2d Cir. 1970) was as follows:

> I want to advise you, Mr. Lombardo, that you have all the rights and privileges guaranteed by the Laws of the State of New York and the Constitution of this State and of the United States, including the right to be represented by counsel at this inquiry, the right to remain silent, although you may be subject to disciplinary action by the Department of Sanitation for the failure to answer material and relevant questions relating to the performance of your duties as an employee of the City of New York.
>
> I further advise you that the answers you may give to the questions propounded to you at this proceeding, or any information or evidence which is gained by reason of your answers, may not be used against you in a criminal proceeding except that you may be subject to criminal prosecution for any false answer that you may give under any applicable law, including Section 1121 of the New York City Charter.

[51] *See* United States v. Devitt, 499 F.2d 135 (7th Cir. 1974); Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), *cert. denied,* 416 U.S. 956 (1974); Peden v. United States, 512 F.2d 1099 (Ct. Cl. 1975); Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973). *But see* Devine v. Goodstein, 680 F.2d 243 (D.C. Cir. 1982); Womer v. Hampton, 496 F.2d 99 (5th Cir. 1974); Terry v. United States, 499 F.2d 695 (Ct. Cl. 1974), *cert. denied,* 421 U.S. 912 (1975).

[52] 426 F.2d 619 (2d Cir. 1970), *cert. denied,* 406 U.S. 961 (1972).

[53] 392 U.S. 280, 284–85 (1968).

[54] *Uniformed Sanitation Men Ass'n,* 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied,* 406 U.S. 961 (1972).

[55] 473 F.2d at 1393. *See also* Peden v. United States, 512 F.2d 1099 (Ct. Cl. 1975).

"that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings," and, in support of its conclusion, cited *Uniformed Sanitation Men Ass'n* and *Kalkines*.[56]

It is then the Second Circuit's decision in *Uniformed Sanitation Men Ass'n* which is the progenitor of the requirement to advise public employees prior to questioning. A close examination of the manner in which the Second Circuit reached its decision discloses its rather speculative and arbitrary origins. The Second Circuit was pressed, it appears, to explain the meaning of the phrase "after proper proceedings" in the Supreme Court's prior decision involving the same parties:

> Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, *after proper proceedings*, which do not involve an attempt to coerce them to relinquish their constitutional rights.[57]

The Second Circuit interpreted "after proper proceedings" to mean proceedings in which the public employee "is duly advised of his options and the consequences of his choice."[58] The Second Circuit did not support its conclusion by citation to any authority. Further, the Supreme Court's language was itself unsupported by authority. The Second Circuit's attempt to interpret this three-word phrase of the Supreme Court must be considered speculative and its conclusion must be considered arbitrary.

On the other hand, it does seem clear that the public employer can use an advisement to overcome an assertion of the fifth amendment privilege against self-incrimination. A properly constructed advisement can constitutionally coerce a public employee to talk, at the risk of losing his or her job, regardless of exposure to subsequent criminal prosecution or assertion of the privilege against self-incrimination. An advisement creates the "compulsion" necessary to trigger immunity, even when immunity would not ordinarily arise without an unconstitutional constraint being placed upon the employee.[59] Immunity "coextensive with the privilege" supplants the privilege; use, and derivative use, is the immunity which supplants that privilege.[60] The public employer can compel the public employee to give information over an assertion of the fifth amendment privilege, so long as the public employee has the benefit of immunity.[61] Advisements, then, can be the vehicle whereby the public employer creates the immunity necessary to supplant the fifth amendment privilege.

III. Investigative Interview

Complex principles have emerged from the clash of two compelling but conflicting rights. The public employer has the right to receive information regarding the performance of duties by a public employee, and the public employee, like anyone else, has the right to the protection provided by the privilege against self-incrimination. The Supreme Court has resolved the collision of these two rights by constructing a principle which preserves both:[62] the recognition of immunity for compelled testimony.[63] Understanding the principle, however, is not simple.

From the practical point of view, the application of the principle can be broken down into four possible situations: (a) the employee voluntarily talks; (b) the employee refuses to talk, but neither asserts the fifth amendment privilege against self-incrimination nor evidences a fear of criminal prosecution; (c) the employee refuses to talk and asserts the fifth amendment privilege against self-incrimination or evidences a fear of criminal prosecution; or (d) the employee talks after compulsion. Each of these situations will be discussed below.

A. The Employee Voluntarily Talks

When a public employee voluntarily[64] responds to questions of a management representative in an investigative interview, there is no violation of the employee's privilege against self-incrimination. The Supreme Court has distinguished the situation where the public employee is coerced into waiving fifth amendment protections from situations "where one who is anxious to make a clean breast of the whole affair volunteers the information."[65] Generally, an individual who reveals information instead of claiming the

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[56] 489 F.2d at 894. The Seventh Circuit later reaffirmed its interpretation in United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975, 95 S.Ct. 1974 (1975).

[57] 392 U.S. at 284–85 (citations omitted) (emphasis added).

[58] *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d at 627.

[59] Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Garrity v. New Jersey, 385 U.S. 493 (1967).

[60] Kastigar v. United States, 406 U.S. 441 (1972).

[61] *See* Marsh v. Civil Service Commission, 64 Ohio App. 2d 151, 411 N.E.2d 803 (1977).

[62] "When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. United States v. Burr, 25 F. Cas., pp. 38, 39 (No. 14,692e) (CC Va. 1807)." United States v. Mandujano, 425 U.S. 564, 590 (1976) (Brennan, J., concurring).

[63] Immunity statutes are described as a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify" in *Kastigar v. United States*, 406 U.S. at 446. *See Lefkowitz v. Turley*, 414 U.S. at 81.

[64] The term "voluntary" is used where disclosures are not the result of "compulsion," *i.e.*, where the disclosures are not "required in the face of a claim of privilege." *See* Garner v. United States, 424 U.S. 648, 654 n.9 (1976).

[65] *Garrity v. New Jersey*, 385 U.S. at 499.

privilege has lost the benefit of the privilege,[66] and the "mere furnishing" of information creates no immunity.[67] The result is the same whether or not the questions asked were "specifically, directly, and narrowly" related to the performance of official duties;[68] the "Constitution does not forbid the asking of criminative questions."[69]

B. The Employee Refuses to Talk and Does Not Assert the Privilege

When a public employee refuses to respond to questions specifically, directly, and narrowly related to performance of official duties, and does not assert the privilege against self-incrimination or otherwise evidence a fear of subsequent criminal prosecution, the employee may be appropriately disciplined or discharged based upon that refusal.[70]

The public employer has no duty to ascertain why the employee will not respond; the employee must specifically assert the fifth amendment privilege.[71] The fifth amendment privilege against self-incrimination "is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion."[72] The privilege is "an option of refusal and not a prohibition of inquiry."[73] The constitutional privilege "cannot be violated before it can be invoked."[74] Questions, no matter how incriminatory, are not "compelled" within the meaning of the fifth amendment privilege against self-incrimination until the privilege is claimed.[75] Immunity arises only after an answer is compelled following an assertion of the fifth amendment privilege against self-incrimination.[76]

In this instance, discipline or discharge of a public employee turns upon the employee's breach of the duty to provide information relative to "governmental" interests.[77] The duty to provide information relative to "governmental" interest requires a response to questions "specifically, directly, and narrowly relating to the performance of . . . official duties."[78] The public employee cannot be compelled to answer questions which fall outside this scope and cannot be disciplined or discharged for failing to answer[79] or for asserting the fifth amendment privilege when questioning goes beyond this scope.[80] Beyond the specific and defined protection, however, public employees "do not have an absolute right to refuse to account for their official actions and still keep their jobs."[81] Barring other constitutional infringements, when the questions are "specifically, directly, and narrowly" related to performance of official duties, the public employee is not excused from responding because of possible exposure to criminal prosecution.[82] The employee must respond similarly where

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[66] United States v. Kordel, 397 U.S. 1 (1970). In United States v. Monia, 317 U.S. 424 (1943), the Court stated:

> The [fifth] amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he deserves the protection of the privilege, he must claim it or he will not be considered to have been compelled within the meaning of the Amendment.

317 U.S. at 427 (cited with approval by the majority in *United States v. Mandujano*, 425 U.S. at 574–75). *See also* United States v. B. Goedda & Co., 40 F. Supp. 523 (E.D. Ill. 1941). *See generally*, Annot., 47 L. Ed. 2d 922 (1975) (loss of privilege against self-incrimination by individual as result of his action or inaction occurring when he was not accused—Supreme Court cases); Annot., 5 A.L.R. 2d 1404 (1949) (use in subsequent prosecutions of self-incriminating testimony given without invoking privilege).

[67] *See* Sherwin v. United States, 268 U.S. 369 (1925).

[68] *Garnder v. Brockerick*, 392 U.S. at 278; *Uniformed Sanitation Men Ass'n*, 392 U.S. at 284; Spevack v. Klein, 385 U.S. 511, 519 (1967) (Fortas, J., concurring).

[69] United States v. Monia, 317 U.S. 424, 433 (1943) (Frankfurter, J., dissenting).

[70] Johnson v. Herschler, 669 F.2d 617 (10th Cir. 1982). *See* Devine v. Goodstein, 680 F.2d 243 (D.C. Cir. 1982) (fear of civil disciplinary action); United States v. Indorato, 628 F.2d 711 (1st Cir.), *cert. denied*, 449 U.S. 1016 (1980) (subjective fears do not constitute compulsion).

[71] *Johnson v. Herschler. See* Navy Public Works Center, Pearl Harbor v. FLRA, 678 F.2d 97 (9th Cir. 1982) ("when properly invoked"); Gulden v. McCorkle, 680 F.2d 1070, 1076 (5th Cir.), *reh'g denied*, 685 F.2d 157 (1982), *cert. denied*, 103 S. Ct. 1194 (1983); Slevin v. City of New York, 551 F. Supp. 917 (S.D.N.Y. 1982). An individual must assert this privilege in other areas as well. *See* Roberts v. United States, 445 U.S. 552 (1980) (sentencing); Garner v. United States, 424 U.S. 648 (1976) (tax disclosures); United States v. Kordel, 397 U.S. 1 (1969) (civil condemnation proceedings); Hoffman v. United States, 341 U.S. 479 (1951) (grand jury hearing); Rogers v. United States, 340 U.S. 367, *reh'g denied*, 341 U.S. 912 (1951) (contempt); United States v. Murdock, 284 U.S. 141 (1931) (tax disclosures); United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927) (immigration hearing); United States v. Shamy, 656 F.2d 951 (4th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); United States v. Vermeulen, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971); May v. United States, 175 F.2d 994 (D.C. Cir. 1949); United States v. Goedde & Co., 40 F. Supp. 523 (E.D. Ill. 1941).

[72] Maness v. Meyers, 419 U.S. 449, 466 (1975) (criminal contempt against lawyer). *See* Roberts v. United States, 445 U.S. 552 (1980).

[73] Morgan v. Thomas, 321 F. Supp. 565, 587 (S.D. Miss. 1970).

[74] United States v. Trammel, 583 F.2d 1166, 1169 (10th Cir. 1978), *aff'd*, 445 U.S. 40 (1980).

[75] United States v. Mandujano, 425 U.S. 564 (1976).

[76] Lefkowitz v. Turley, 414 U.S. 70 (1973). *See* Garner v. United States, 424 U.S. 648, 654 n.9 (1976).

[77] *See* Roberts v. United States, 445 U.S. 551 (1980); *Garner v. United States. See also* Navy Public Works Center, Pearl Harbor v. FLRA, 678 F.2d 97 (9th Cir. 1982).

[78] *Gardner v. Broderick*, 392 U.S. at 278. *Uniformed Sanitation Men Ass'n*, 392 U.S. at 284; Spevack v. Klein, 385 U.S. 511, 519 (1967) (Fortas, J., concurring).

[79] Slevin v. City of New York, 551 F. Supp. 917, 926 (S.D.N.Y. 1982).

[80] *In re* Alleged Prohibited Political Activity Philadelphia Redevelopment Authority, 443 F. Supp. 1194, 1202 n.13 (E.D.Pa. 1977).

[81] *Uniformed Sanitation Men Ass'n*, 426 F.2d at 627.

[82] Kastigar v. United States, 406 U.S. 441 (1972); Gardner v. Broderick, 392 U.S. 273 (1968).

the possible exposure is to civil prosecution,[83] or other forms of social opprobrium.[84] The former because the public employee is provided use immunity under *Garrity v. New Jersey*, and the latter because the privilege against self-incrimination is a privilege limited to criminal consequences.[85] In *Grabinger v. Conlisk*, the Court stated:

> It is not the law that a public employer, in the course of a disciplinary hearing into an employee's conduct, may not require an employee to disclose information reasonably related to his fitness for continued employment. The net of *Garrity*, *Broderick* and *Uniformed Sanitation Men* is that if a public employee refuses to testify as to a matter concerning which his employer is entitled to inquire, he may be discharged for insubordination, but if he does testify his answers may not be used against him in a subsequent criminal proceeding.[86]

This duty, for public employees of the federal government, is unaffected by the 1978 Civil Service Reform Act.[87]

The question of whether the questions are "specifically, directly, and narrowly" related to the performance of official duties, is a question of fact.[88] Questions which have been held to be within the description are questions pertaining to personal finances of police officers on a financial questionnaire,[89] whether the employee might have telephoned a bomb threat to his or her employer's location during working hours,[90] homosexual conduct affecting a security clearance,[91] whether the employee observed sexual activity by another employee while on duty,[92] relationships to the Cuban Communist party and Cuban Government as affecting security clearances,[93] and a firefighter's knowledge of a false alarm.[94] Questions pertaining to personal finances under a financial disclosure law,[95] to Hatch Act violations,[96] and to an inquiry of whether the employee did or did not assert the privilege against self-incrimination[97] have been held to be outside the permissible scope. Although there may be cases in the future dealing with whether certain questions are or are not "specifically, directly and narrowly" related to performance of official duties, little will be added to the more important theoretical difficulties involved.

C. The Employee Refuses to Talk and Asserts the Privilege

When a public employee refuses to respond to questions specifically, directly, and narrowly related to the performance of official duties and asserts the privilege against self-incrimination or otherwise evidences a fear of subsequent criminal prosecution, the employee may be appropriately disciplined or discharged for that refusal so long as the basis for the discipline or discharge is not the assertion of the privilege or the refusal to waive immunity from subsequent criminal prosecution.

The public employee cannot be disciplined or discharged because he or she asserted the privilege against self-incrimination.[98] On the other hand, an assertion of the privilege against self-incrimination will not alone insulate the public employee from discipline or discharge. The assertion of the privilege, for instance, must be "reasonable."[99] An employee cannot assert the fifth amendment privilege against self-incrimination where it is unreasonable to believe that statements given could be used, or derivatively used, in a criminal proceeding.[100] The assertion of the privilege, even where reasonable, will not bar dismissal for refusing to respond where the questions are specifically, directly, and narrowly related to official duties and the employee is not

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[83] Childs v. McCord, 420 F. Supp. 428 (D. Md. 1976). *Cf. In re Daley*, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977) (state bar disciplinary proceedings).

[84] In DeVita v. Sills, 422 F.2d 1172, 1179 (3d Cir. 1970) the court stated:

> It is for the same reason that a witness who has been given immunity from prosecution must testify although his testimony may expose him to such extra-legal pressures as loss of job, expulsion from labor unions, state registration and investigation statutes, passport eligibility, and general public opprobrium.

[85] *See* Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896).

[86] 320 F. Supp. 1213, 1217–18 (N.D. Ill. 1970).

[87] Civil Service Reform Act, Pub. L. No. 95–454, 92 Stat. 1111 (1978) (codified at 5 U.S.C. § 1101 (1982)). *See* Navy Public Works Center, Pearl Harbor v. FLRA, 678 F.2d 97 (9th Cir. 1982).

[88] Baxley v. North Carleston, 533 F. Supp. 1248, 1252 n.3 (D.S.C. 1982).

[89] O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

[90] Gulden v. McCorkle, 680 F.2d 1070, 1076 (5th Cir.), *reh'g denied*, 685 F.2d 157 (1982), *cert. denied*, 103 S. Ct. 1194 (1983).

[91] Marks v. Schlesinger, 384 F. Supp. 1373 (C.D. Cal. 1974).

[92] McLean v. Rochford, 404 F. Supp. 191 (N.D. Ill. 1975).

[93] Clifford v. Shoultz, 413 F.2d 868 (9th Cir.), *cert. denied*, 396 U.S. 962 (1969).

[94] Marsh v. Civil Service Commission, 64 Ohio App. 2d 151, 411 N.E.2d 803 (1977).

[95] Slevin v. City of New York, 551 F. Supp. 917 (S.D.N.Y. 1982).

[96] *In re* Alleged Prohibited Political Activity Philadelphia Redevelopment Authority, 443 F. Supp. 1194 (E.D. Pa. 1977).

[97] Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974).

[98] McLean v. Rochford, 404 F. Supp. 191 (N.D. Ill. 1975). *See* Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968). *See also* Diebold v. Civil Service Commission, 611 F.2d 697 (8th Cir. 1979); Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973); Marsh v. Civil Service Commission, 64 Ohio App. 2d 151, 411 N.E.2d 803 (1977).

[99] Devine v. Goodstein, 680 F.2d 243 (D.C. Cir 1982); Terry v. United States, 499 F.2d 695 (Ct. Cl. 1974), *cert. denied*, 421 U.S. 912 (1975).

[100] *Devine v. Goodstein; Terry v. United States. See* Kastigar v. United States, 406 U.S. 441 (1972); Hoffman v. United States, 341 U.S. 479 (1951); Brown v. Walker, 161 U.S. 591 (1896).

compelled to waive the privilege by threat of discharge.[101] The choice between refusing to respond and risking discharge is not the same as the "choice" between surrendering the privilege against self-incrimination and certain discharge.[102] The former is a "permissible" choice;[103] the latter is an impermissible "Hobson's" choice.[104] It is "the compelled answer in conjunction with the compelled waiver of immunity that creates the Hobson's choice for the employee."[105] The distinction is one of "permissibly burdening the choice to remain silent and impermissibly compelling outright waiver of the immunity conferred by the privilege;"[106] there is no general "right to withhold factual information."[107] The assertion, alone, of the fifth amendment privilege against self-incrimination "grants neither pardon nor amnesty."[108] The assertion of the fifth amendment privilege against self-incrimination is, then, no talisman protecting the public employee from discharge for failure to respond to proper questions.

Additionally, the public employee cannot be disciplined or discharged for refusing to waive immunity from subsequent prosecution.[109] This must be considered the same, in theory, as discipline or discharge for asserting the privilege itself, except that this situation occurs later in time since immunity arises after the assertion. As the public employer cannot discharge or discipline for the initial assertion, it also cannot discharge or discipline for the employee's refusal to waive the resulting immunity which comes from the assertion.[110]

The traditional view is that a public employee may be disciplined or discharged for refusal to provide information. In *Spevack v. Klein*,[111] Justice Fortas offered his judgment that disbarment proceedings for an attorney ought to be treated differently than discharge proceedings for a public employee because of the existence of the public employee's duty to account to the government. He stated, "This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."[112] Justice Harlan, joined by Justices Clark and Stewart, offered, "[S]o long as state authorities do not derive any imputation of guilt from a claim of the privilege, they may in the course of a bona fide assessment of an employee's fitness for public employment require that the employee disclose information reasonably related to his fitness, and may order his discharge if he declines."[113] Justice White objected to a *per se* rule espoused by the majority: "I see no reason for refusing to permit the State to pursue its other valid interest and to discharge an employee who refuses to cooperate in the State's effort to determine his qualification for continued employment."[114] These concurring and dissenting opinions appear to have persuaded the Court in subsequent cases. In *Gardner v. Broderick*,[115] Justice Fortas, speaking for the entire Court, determined that a state may not discharge a public employee for refusing to waive the fifth amendment privilege against self-incrimination. He interpreted *Spevack* to mean that a lawyer could not be disbarred solely because he refused to testify at a disciplinary proceeding on the ground that his testimony would tend to incriminate him.[116] Justice Fortas went on to add the influential dicta that:

> If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self-

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[101] Gardner v. Broderick, 392 U.S. 272 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); DeWalt v. Barger, 490 F. Supp. 1262 (M.D.Pa. 1980). *See* Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Gulden v. McCorkle, 680 F.2d 1070 (5th Cir.), *reh'g denied*, 685 F.2d 157 (1982), *cert. denied*, 103 S. Ct. 1194 (1983); Clifford v. Shoultz, 413 F.2d 868 (9th Cir.), *cert. denied*, 396 U.S. 962 (1969); Pinkney v. District of Columbia, 439 F. Supp. 519 (D.C. Cir. 1977); McLean v. Rochford, 404 F. Supp. 191 (N.D. Ill. 1975); Silverio v. Municipal Court of Boston, 355 Mass. 623, 247 N.E.2d 379, *cert. denied*, 396 U.S. 878 (1969). *But see* Marsh v. Civil Service Commission, 64 Ohio App. 2d 151, 411 N.E.2d 803 (1977).

[102] DeWalt v. Barger, 490 F. Supp. 1262 (M.D.Pa. 1980).

[103] Diebold v. Civil Service Commission, 611 F.2d 697 (8th Cir. 1979).

[104] Pinkney v. District of Columbia, 439 F. Supp. 519 (D.C. Cir. 1977).

[105] Gulden v. McCorkle, 680 F.2d 1070, 1074 (5th Cir.), *reh'g denied*, 685 F.2d 157 (1982), *cert. denied*, 103 S. Ct. 1194 (1983).

[106] *Pinkney v. District of Columbia*, 439 F. Supp. at 534.

[107] *Clifford v. Shoultz*, 413 F.2d at 876.

[108] *See Kastigar v. United States*, 406 U.S. at 461 (statutory amnesty).

[109] Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967). *See also* Gulden v. McCorkle, 680 F.2d 1070 (5th Cir.), *reh'g denied*, 685 F.2d 157 (1982), *cert. denied*, 103 S. Ct. 1194 (1983); Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); DeVita v. Sills, 422 F.2d 1172 (3d Cir. 1970); Luman v. Tanzler, 411 F.2d 164 (5th Cir.), *cert. denied*, 396 U.S. 929 (1969); Pinkney v. District of Columbia, 439 F. Supp. 519 (D.C. Cir. 1977); Boulware v. Battaglia, 344 F. Supp. 889 (D.Del. 1972); Grabinger v. Conlisk, 320 F. Supp. 1213 (N.D. Ill. 1970); Peden v. United States, 512 F.2d 1099 (Ct. Cl. 1975); Terry v. United States, 499 F.2d 695 (Ct. Cl. 1974), *cert. denied*, 421 U.S. 912 (1975).

[110] The cases upon which the constitutional bar arises were, admittedly, circumstances where the request to waive immunity was required by statute with no actual "sequential" relationship; nevertheless, the results would be the same, however "compelled."

[111] 385 U.S. 511 (1967).

[112] *Id.* at 519 (Fortas, J., concurring).

[113] *Id.* at 528 (Harlan, J., dissenting).

[114] *Id.* at 532 (White, J., dissenting).

[115] 392 U.S. 273 (1968).

[116] *Id.* at 277.

incrimination would not have been a bar to his dismissal.[117]

Again, in *Uniformed Sanitation Men Ass'n,* Justice Fortas, speaking for the Court, set aside the dismissal of twelve sanitation workers who were dismissed because they asserted the privilege against self-incrimination and repeated the essentials of *Gardner:*

> Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. *Gardner v. Broderick; Garrity v. State of New Jersey (Murphy v. Waterfront Commission,* 378 U.S. 52, at 79 (1964)). At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.[118]

These cases show that a public employee can be disciplined or discharged for refusing to provide information after asserting the fifth amendment privilege against self-incrimination, provided the discipline or discharge is not for the assertion of the privilege or for the refusal to waive immunity. State and federal courts have not hesitated to permit discharge or discipline of an employee for refusing to provide information even after an assertion of the privilege or an expression of fear of criminal prosecution.[119]

It is in this context that the academic issue arises of whether the Constitution should be interpreted to forbid any consequences after the assertion of the fifth amendment privilege against self-incrimination. It is apparent that if the privilege was so interpreted, no public employee could be disciplined or discharged for refusing to provide information after asserting the privilege.

In *Spevack v. Klein,*[120] the Supreme Court held that a state violated both the fifth and fourteenth amendments by disbarring a lawyer for assertion of the privilege against self-incrimination during disbarment proceedings. Justice Douglas took the apparent position that "the imposition of *any* sanctions which makes assertion of fifth amendment privilege 'costly,' "[121] was a penalty and constitutionally impermissible. Justice Harlan, joined by Justices Clark and Stewart, attached the labels of "broad proposition" and "broad prohibition" to the rule that "*any* consequence of a claim of the privilege against self-incrimination which renders that claim 'costly' is an 'instrument of compulsion' which impermissibly infringes on the protection offered by the privilege."[122]

The Supreme Court retreated from this position in *Gardner v. Broderick,*[123] when it limited the impact to consequences which were said to have occurred "solely" because of the assertion of the fifth amendment privilege against self-incrimination. The privilege against self-incrimination was determined not to bar the dismissal of a public employee when employment-related questions were asked and the employee was not required to "waive his immunity with respect to the use of his answer or the fruits thereof in a criminal prosecution of himself,"[124] as provided in *Garrity. Uniformed Sanitation Men Ass'n,* decided the same day, turned on the same issue.

In *Baxter v. Palmigiano,*[125] the issue was whether the state could draw an adverse inference from a state prison inmate's silence during disciplinary proceedings. In finding this inference permissible in the absence of an "automatic" penalty for the assertion of the privilege against self-incrimination, the Court stated:

> Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inference against parties to civil actions when they refuse to testify in response to probative evidence offered against them; the Amendment "does not preclude the inference where the privilege is claimed by a party to a civil cause."[126]

In dissent, Justices Brennan and Marshall resurrected the concept that *any* consequences are prohibited, stating, "[T]he premise of the *Garrity-Lefkowitz* line was not that compulsion resulted from the automatic nature of the sanction, but that a sanction was imposed that made costly the exercise of the privilege."[127] In *Lefkowitz v. Cunningham,* Chief Justice Burger, in holding a New York statute unconstitutional which compelled an officer of a political party to waive the privilege against self-incrimination, examined *Garrity, Gardner, Uniformed Sanitation Men Ass'n,* and *Turley,* and concluded: "These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized."[128] The term "imposing sanctions," in view of the cases the statement is drawn from, means no more than the sanctions

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[117] *Id.* at 278 (citation omitted).

[118] 392 U.S. at 284–85.

[119] *See, e.g.,* DeWalt v. Barger, 490 F. Supp. 1262 (M.D.Pa. 1980); Silverio v. Municipal Court of the City of Boston, 355 Mass. 623, 247 N.E. 2d 379, *cert. denied,* 396 U.S. 878 (1969).

[120] 385 U.S. 511 (1967).

[121] *Id.* at 515 (dicta) (emphasis added).

[122] *Id.* at 525 (Harlan, J., dissenting) (emphasis added).

[123] 392 U.S. 273 (1968).

[124] *Id.* at 278.

[125] 425 U.S. 308 (1976).

[126] *Id.* at 318.

[127] *Id.* at 331 (Brennan and Marshall, JJ., dissenting).

[128] 431 U.S. 801, 806 (1977).

imposed for refusing to waive the fifth amendment privilege against self-incrimination, and is noncontroversial. Justice Stevens' dissent, however, stated:

> It is often incorrectly assumed that whenever an individual right is sufficiently important to receive constitutional protection, that protection implicitly guarantees that the exercise of the right shall be cost free. Nothing could be further from the truth. The right to representation by counsel of one's choice, for example, may require the defendant in a criminal case to pay a staggering price to employ the lawyer he selects. Insistence on a jury trial may increase the cost of defense. The right to send one's children to a private school, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, may be exercised only by one prepared to pay the associated tuition cost. [129]

Whatever the merits of this controversy, it is clear that the decisions of the Supreme Court cannot be said to have established a rule that there can be no discipline of an employee after the assertion of fifth amendment rights. The penalty should survive constitutional scrutiny if it derives from other reasons, *i.e.*, refusal to provide information [130] or other disciplinary grounds. [131]

D. The Employee Is Compelled To Talk

When a public employee is compelled to respond to questions specifically, directly, and narrowly related to the performance of official duties, the employer may utilize the information provided to appropriately discipline or discharge the employee. [132] Such responses, however, are immune from use, as are any resulting fruits thereof, in a subsequent criminal prosecution. [133] An employee is "compelled" when the employee is coerced to respond after asserting the fifth amendment privilege against self-incrimination. [134] In the event the public employee refuses to respond, even though compelled by benefit of immunity, the employee may be appropriately disciplined or discharged for that refusal [135] so long as the basis for that discipline or discharge is not the assertion of the privilege [136] or the refusal to waive immunity from subsequent criminal prosecution. [137]

In this situation, a question that frequently arises is whether the public employer or its representative has the authority to grant immunity. Although the terms are frequently used, the courts have made it clear that immunity is not "granted" so much as it is "created" by a compulsion to respond to questions over the assertion of the privilege. [138] Because it is not "granted" there is no need for any "authority" to grant immunity. There is, in actuality, a question of who has the authority to compel the employee to respond, thus giving rise to immunity, and not a question of who has the authority to grant immunity. Immunity springs from the compulsion to speak after asserting the fifth amendment privilege against self-incrimination, not from a grant by any individual. As no person can be said to grant a constitutional right, no person can be said to grant immunity in this context. Here, immunity is of "constitutional fabric." [139]

IV. Conclusion

The Supreme Court has fashioned a delicate accommodation of two conflicting rights—the public employee's fifth amendment right against self-incrimination, and the public employer's fundamental employment right to obtain job-related information from its employees. This accommodation, through the concept of use immunity, is an inventive product of the Court's traditional role of balancing conflicting rights. It has the laudable effect of placing public sector employees on a parity with their private sector contemporaries. It is, however, complex. The carefully sculptured contours of the accommodation are not easy to reduce to rules and, hence, may be excessively intricate for the employment environment. Finally, the Supreme Court should resolve the area of doubt that exists as to the public employer's obligation to give advisements to public employees on these matters. Specifically, the Court needs to confirm or deny that the obligation exists and, if so, the rationale, timing and substance of such advisements.

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[129] *Id.* at 810 n.1 (Stevens, J., dissenting).

[130] Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. State of New Jersey, 385 U.S. 493 (1967).

[131] DeWalt v. Barger, 490 F. Supp. 1262 (M.D.Pa. 1980).

[132] *In re* Bowes v. Commission to Investigate Allegations of Police Corruption & the City Anti-Corruption Procedures, 330 F. Supp. 262, 264 (S.D.N.Y. 1971), the court stated, "Moreover, if the sergeants testify under a grant of 'use immunity,' they may nevertheless be discharged if their testimony indicates they are not performing their official duties as required."

[133] Lefkowitz v. Turley, 414 U.S. 70 (1973); Garrity v. State of New Jersey, 385 U.S. 493 (1967). *See* Kastigar v. United States, 406 U.S. 441 (1972); Womer v. Hampton, 496 F.2d 99 (5th Cir. 1974); Grabinger v. Conlisk, 320 F. Supp. 1213 (N.D. Ill. 1970); United States v. Anderson, 450 A.2d 446 (D.C. 1982).

[134] *See* United States v. Mandujano, 425 U.S. 564 (1976).

[135] Lefkowitz v. Turley, 414 U.S. 70 (1973). *See* Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 426 F.2d 619 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972); Hank v. Codd, 424 F. Supp. 1086 (S.D.N.Y. 1975); McLean v. Rochford, 404 F. Supp. 191 (N.D.Ill. 1975); Silerio v. Municipal Court, 355 Mass. 623, 247 N.E.2d 379 (1969).

[136] *See supra* note 98.

[137] *See supra* note 109.

[138] *See* Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 426 F.2d 619 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972); Hank v. Codd, 424 F. Supp. 1086, 1087 (S.D.N.Y. 1975).

[139] Ullman v. United States, 350 U.S. 422, 438 (1956). *See* Lefkowitz v. Turley, 414 U.S. 70, 81 (1973).

Handling Social Security Disability Cases

Captain Richard B. Davis, Jr., FL ARNG
Staff Judge Advocate, Camp Blanding, Florida

It was an exciting day. The newly purchased and freshly cleaned (but not starched) BDUs tucked neatly into the top of my spit-shined jump boots rustled briskly as I followed the chief of legal assistance at Fort Stewart, Georgia, into his office for my introduction into the heady practice of military law.

I was a two-week refugee from the day-to-day urgencies and travail of my rural private law practice. By virtue of my status as a Reservist, an Individual Mobilization Augmentee, and my appointment as a JAG officer, I had gone from a sole practitioner in the backwoods of North Florida, to a functioning Army lawyer in the "Biggest Law Firm in the World."

Imagine, if you can, the relief that I felt when my first case was a Social Security benefits case instead of what I feared I would handle as an Army lawyer—arguing some obscure point of the Geneva Convention on a Motion to Dismiss before the World Court. I do not get to practice much International Law in my private practice, but Social Security claims are becoming an influential factor in my monthly income statements, and may become an increasingly recurrent category of legal assistance cases.

As the Korean War and Vietnam-era military retirees and their family members age and seek Social Security disability benefits, legal assistance offices will experience an increase in requests for assistance in seeking reconsideration or appeals of the denial of benefits. If the legal assistance officer is somewhat familiar with the procedure, knows where to look for the law, and has pre-printed forms on hand, he or she can efficiently and, in many cases successfully, assist his client.

My mission was to seek a successful reconsideration of the denial of a Social Security disability claim by a medically retired NCO who had been diagnosed as having Alzheimer's Disease. To avoid suspense I can tell you the request for reconsideration of the claim was ultimately successful and the benefits were awarded. The recovery inured to the benefit and reputation of the legal assistance office at Fort Stewart, as well as to the client and his family.

The successful handling of a Social Security disability claim may appear to be much more complex than it really is. Typically, this legal assistance will be provided only at the Request for Reconsideration of Denial of Benefits level of a social security claim, after an application for benefits has been submitted by the claimant to the Social Security Administration. It is at the Request for Reconsideration level that many denials of Social Security benefits can be reversed by the Social Security Administration itself, before the claimant incurs the expense of an attorney's representation and costs of an appeal or administrative hearing which will be discussed below.[1] The evidence and documentation that you provide at this level, even if the denial of benefits is not reversed, can provide a basis from which a civilian attorney can pursue further evidence such as medical depositions, eye-witness testimony, *etc.*, which may result in the administrative law judge awarding benefits at the next level—an administrative hearing. The claimant may go before the administrative law judge unrepresented to testify in person or may simply have the file reviewed by the administrative law judge without a hearing. You may prepare the non-represented claimant for this hearing, but you will not be permitted to represent him or her at the hearing without the requisite authorization from The Judge Advocate General.[2]

There are five steps in representing a Social Security claimant: (1) obtaining the requisite documentation and authorizations from the claimant; (2) obtaining copies of medical, employment, education, and other records; (3) researching the application of your client's medical, employment, educational and personal facts to the rules and regulations promulgated by the Social Security Administration;[3] (4) the organization and presentation of the evidence which you have obtained, and, if necessary; (5) the appeal.

Step 1—Obtaining Information and Authorizations

The interview with your client should be comprehensive. The names and addresses of specific witnesses to medical or factual circumstances should be obtained. The names and addresses of medical care providers, together with the dates

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[1] A reference chart covering these procedural steps is at Appendix A.

[2] Dep't of Army Reg. No. 27-3, Legal Services-Legal Assistance, para. 2-2 (1 Mar 1984), sets forth in specific detail the circumstances under which you may appear on behalf of an eligible person. Para. 2-2a(7) allows "general advice" in civil suit matters "even though, in most cases representation in Court is prohibited." Para. 2-2a(9) authorizes "other services" to individuals which appears to encompass the general idea of assistance with a Social Security Claim. Likewise, para. 2-3a authorizes office counselling and legal advice to a client "short of actual Court appearances."

Contra para. 2-5b(1)(c) prohibits legal assistance officers from participating in litigation against the United States or a U.S. agency or official without prior approval from The Judge Advocate General. It is not clear whether providing assistance with non-criminal administrative claims is within the prohibition of this paragraph. Additionally, *JAGC Personnel Policies*, para. 9-3 (Oct. 1985) states:

> Judge advocates and civilian attorneys in the Judge Advocate Legal Service may not engage in the private practice of law or appear in civilian courts, tribunals, hearings, boards, etc., on behalf of a person other than themselves or members of their immediate family. Exceptions to this policy may be authorized by TJAG upon the request of the judge advocate or civilian attorney. Under no circumstances will a judge advocate or civilian attorney undertake such private practice without first obtaining the written approval of TJAG.

[3] 20 C.F.R. parts 400-499 (1985).

that treatment and hospital admissions took place, should be carefully noted.

A suggested Social Security claimant's questionnaire is included at Appendix "B." Note the need to obtain verification of the requisite number of quarters of employment before a claimant becomes eligible to receive social security disability benefits.[4]

Authorizations are necessary to obtain most records kept by state, local, or federal government agencies, employers, and medical care providers. The releases may vary in form and context depending upon state law peculiarities, but a model form release is provided at Appendix "C." Note that each of these forms should be signed but not dated by the claimant at the initial interview. They should be dated by you or your clerk when they are forwarded to the various record keepers. Each release should contain words to the effect that the presentation of a copy of the release is sufficient authorization to provide or release the information requested.

Step 2—Obtaining the Information

The Social Security Act provides for the payment of Social Security benefits to persons who are qualified under the Act by having worked the requisite number of quarters and by demonstrating the claimant's inability to do *any* substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than twelve months or result in death.[5]

Therefore, the letters sent to physicians should include requests for the following information:

1. A letter on the doctor's letterhead stating that he or she has either examined or treated your claimant;
2. His or her diagnosis of the claimant's disease or condition;
3. His or her opinion as to the existence of the claimant's total disability;
4. His or her opinion as to the duration of your client's total disability.

It is best to provide the physician with an explanation of the regulation's standards, with the request that he or she address the ability of the claimant to endure prolonged walking, sitting, standing, stooping, bending, reaching, and the amount of lifting, if any.

In some cases, disability is presumed upon the claimant's reaching a certain age together with the lack of education for training for ancillary skills and other factors.[6] You should specifically ask the physician to confirm that the claimant cannot perform the specific mental or physical functions required of that position.

Employment records in some cases show evidence of inability of the claimant to continue his or her former employment. Even informal records such as a letter from a former employer to the Social Security Administration setting forth the disability-related reasons for terminating the employee is extremely helpful evidence.

Education records are sometimes helpful if they clearly demonstrate the inability of the claimant to be retrained or rehabilitated. Use them carefully, for they may also support a theory of employability.

Affidavits of spouses, neighbors, and other relatives and near-by friends are helpful to "fill in the gaps" pertaining to the claimant's inability to function at a compensable level. You should recognize that the standard does not preclude *some* gainful employment, but only that the disability preclude *substantial regular gainful* employment. In cases where a claimant with a lower back pain is unable to work on three or four days out of a five-day work week, he or she is not able to maintain substantial regular gainful employment.

Step 3—Research

Once the information is obtained, you must research the Social Security statutes,[7] the evaluation of disability criteria,[8] the Medical-Vocational Guidelines known as the grid,[9] the Listing of Impairments,[10] and the medical and other data you receive.

The listing is a comprehensive list of mental and physical diseases and conditions which, as a matter of law, are disabling and which entitles your claimant to disability benefits if he or she suffers from both the condition *and* suffers the quality of the condition as indicated on the listings, *i.e.*, "mild."

The evaluation of disability criteria is, very simply, a method by which the claimant's condition may be calculated on the basis of various factors (*i.e.*, age, education, experience) to fall within the term "disabled." In many cases you will be able to compute your client's position on the grid using the interview data and medical and employment records you received.

The evaluation of disability criteria provide a sequential decision-making process to guide an administrative law judge in making a determination in a disability case. There must first be a determination of whether the applicant is working or not. If he or she is working, the claim is denied. Second, there must be a determination on the basis of medical evidence whether the claimed impairment is "severe,"

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[4] 20 C.F.R. §§ 404.20–404.290 (1985).

[5] 20 C.F.R. § 404.1505 (1985).

[6] 20 C.F.R. § 404.1520(f) (1985).

[7] 42 U.S.C. §§ 401–433 (1982).

[8] 20 C.F.R. § 404.1520 (1985).

[9] 20 C.F.R. part 404, subpart P, app. 2 (1985).

[10] 20 C.F.R. part 404, subpart P, app. 1 (1985).

i.e., sufficient to prevent the claimant from having the physical or mental ability to work. If the impairment is not so severe that it interferes with the claimant's physical or mental ability to work, the claim is denied. Third, using medical evidence, a determination must be made as to whether or not the impairment is either equal to or greater than certain of the impairments listed in the Listing of Impairments. If it is, then the claimant is awarded benefits.

Fourth, a determination is made as to whether there is any "residual functional capacity," *i.e.*, what the claimant can do despite his or her limitations to perform his or her past work or other type of work. Finally, the administrative law judge takes into consideration the claimant's age, education, work experience, and residual functional capacity in making a determination as to whether the applicant can perform any other gainful and substantial work.[11]

By putting yourself in the Social Security Administration/administrative law judge's position, you, as attorney for the claimant, can determine what required wording is necessary from the various witnesses and medical care providers. You can then specifically ask for the "magic words" that will indicate the correct severity of your client's impairments.

Step 4—Organization and Presentation

Your presentation for a reconsideration of a denial of Social Security benefits allows you to submit your theory of entitlement on a form SSA 561, "Request for Reconsideration," usually provided with the Notice of Denial of Benefits, together with supporting appendixes of medical records, documents, affidavits and statements.[12] The wording of the Request for Reconsideration may be as formal or informal as you wish; however, it should clearly tie the argument to the evidentiary materials which you attach. Naturally, you will submit the originals of all original documents and copies of all medical documents together with cover letters received with the medical records. Keep copies.

I have never had a copy of a medical record rejected for lack of the requisite authentication by the medical records custodian; however, the best practice mandates compliance with Rules 803, 901, and 902 of the Federal Rules of Evidence. Usually, however, the Social Security Administration will on reconsideration (and the administrative law judge on appeal) consider evidence under the relaxed evidentiary rules.[13]

The statement on the "Request for Hearing" form with the attached and supporting evidentiary materials need not be flowery, verbose or argumentative. It need only outline the reason the various pieces of evidentiary material are being submitted, *e.g.*,

1. Letter of the claimant's family physician to the effect that the claimant's emphysema precludes walking, standing, or sitting without the aid of an oxygen mask.
2. The affidavit of the claimant's wife to the effect that the claimant is unable to leave the bedroom without assistance, is incompetent, and has bouts of forgetfulness and bizarre behavior.

Do not overlook the fact that two separate mental and physical conditions can be added together to demonstrate the total disability of the claimant.[14]

Remember that the reader of your documentation has seen perhaps thousands of cases, many of them the same day as reading yours. Nevertheless, he or she must be shown a way to award the benefits or to be reversed on appeal if he or she does not. At the same time, appeals to compassion are unlikely to be successful without supporting documentation which shows the claimant is entitled to the benefits on the listings or grids.

Step 5—The Appeal

If your efforts at the reconsideration level do not result in an award of Social Security disability benefits, your client or you on his behalf must file a Request for Hearing[15] within sixty days from the date of the Notice of Denial of Social Security Benefits. This does not necessarily mean the client must retain private counsel. You may still assist your client by helping him or her to prepare for the hearing.

The hearings are formal in that testimony is given under oath, it is recorded, an administrative law judge and his or her secretary are present, and evidence is presented both through testimony and documents. The claimant is entitled to the subpoena powers of the administrative law judge to compel the attendance of witnesses who will not voluntarily attend.

The administrative law judge generally conducts a direct examination of the claimant, leaving the attorney or the claimant an opportunity to ask any additional questions or provide any additional information at the conclusion of the judge's examination of the claimant.

The claimant will be asked his name, age, date of birth, educational background, and vocational background. He will be asked about the onset of his physical problems, the effects of the pain or disability on his day from when he wakes up in the morning through his normal toilet activity, through breakfast, through lunch, throughout the afternoon, through supper, and into the evening and after he goes to bed. This questioning is usually very thorough when the claimant's condition is not on the listings or grid and disability must be supported by evidentiary factors. He will also be asked the types of jobs that he has held, other types

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[11] 20 C.F.R. § 404.1520(f) (1985).

[12] 20 C.F.R. § 404.1520; Form SSA 561, "Request for Reconsideration." The form requests the claimant to complete the following: "I disagree with the determination made on the above claim and request a hearing. My reasons for disagreement are:"

[13] 20 C.F.R. § 404.950(e) (1985).

[14] 20 C.F.R. § 404.1523 and appendix 2 (1985).

[15] You must file form HA 501, Request for Hearing, seeking an Administrative Law Judge's ruling on entitlement.

of jobs that may be available to him, and the basis for his belief that he is unable to perform any of these other tasks.

The client should be advised to be candid and conservative, and to articulate his problem precisely. It is not sufficient to say "it hurts too much for me to drive." He should instead say, for example:

> When I sit on the truck seat for a period of time longer than five minutes, the pain begins in the small of my back and goes down through my hip, through the back of my leg to my toes. No amount of changing position or location helps that pain. The pain gets so great that I must get out of the truck and lay perfectly flat until it subsides or else take very strong pain medication which would prevent the safe operation of the truck. The pain is so great that I am unable to shift my foot from the gas to the brake pedal. In addition, the pain in my neck radiates down my left arm and two small fingers tingle and go numb. I lose the strength in my hand and am unable to grasp or turn the steering wheel.

The claimant must be made to understand that the specific effects of his condition have to be stated in clear and precise terms. He cannot assume the administrative law judge will "know what he means."

The only preparation you can provide is to question the claimant shortly before the hearing. Sometimes a brief outline will assist him to articulate the evidence in his own mind in preparation for testifying. He should avoid rehearsing to such an extent that his testimony sounds rehearsed or loses credibility.

Conclusion

This has been a brief outline designed to allow the legal assistance officer to quickly familiarize him or herself with the basic Social Security Claim concepts for the purposes of providing a starting point in assisting a client with a Social Security Administration Claim. It should not be used as a substitute for research and preparation. Additional information, tips, cases, and more comprehensive commentary may be obtained from: 20 C.F.R. parts 400–499 (1985); the Social Security Disability Act, 42 U.S.C. §§ 401–433 (1982) (Note: most annotated versions of the Code include the requisite provisions of 20 C.F.R.); West's Social Security Reporter; and H. McCormick, Security Claims and Procedures (West Publishing Co. 1983).

SOCIAL SECURITY ADMINISTRATION SSI ADMINISTRATIVE APPEALS

	PROCEDURAL STEPS	SSA FORMS	TIME TO FILE	SCOPE OF PROCEDURE	CLAIMANT'S RIGHTS
I	RECONSIDERATION a. case review b. informal conference c. formal conference	SSA-561	60 days after receipt of initial determination within 10 days to request continuation of benefits (within 30 days in case of overpayment)	Review of claim by Social Security Administration Conference with Social Security Administration	Claimant/rep. is not present 1. may appoint representative 2. may review case file 3. may provide additional evidence Claimant/rep. is present 4. may present witnesses 5. proceedings become part of case file 6. may subpoena witnesses 7. may cross-examine witnesses
II	HEARING	HA-501	60 days after receipt of the decision of the reconsideration	Hearing at Bureau of Hearings and Appeals of the Social Security Administration by Administrative Law Judge	Claimant/rep. is present 1. may appoint representative 2. may review case file 3. may provide additional evidence 4. may present witnesses 5. may subpoena witnesses 6. may cross-examine witnesses 7. proceedings become part of case file
III	APPEALS COUNCIL REVIEW	HA-520	60 days after receipt of hearing decision	Review of case file by Social Security Administration in Baltimore. Appeals Council may deny request for review	Claimant is usually not present 1. may file brief in support of claim 2. may provide additional evidence 3. proceedings become part of case file
IV	JUDICIAL REVIEW		60 days after receipt of Appeals Council decision	Review of complete case file by Federal District Court	Claimant needs to obtain attorney

Note: The forms can be obtained from local Social Security District Offices.
Institute on Law and Rights of Older Adults, Brookdale Center on Aging of Hunter College

[16] Reprinted with permission from 19 Clearinghouse Rev. 441 (Special Issue, Summer 1985).

Appendix B

Social Security Claim Questionnaire

Claimant's Name: _____

Address: _____

Date of Birth: _____

Social Security Number: _____

Name of Person Under Whose Name the Claim will be Made: _____

_____

Social Security Number: _____

Date of Birth: _____

Address: _____

Employment History:

From	To	Name of Employer	Address of Employer	Type of Occupation

Type of Case:

A. _____ Reconsideration

B. _____ Appeal

Suspense:

Date of order appealed from: _____/Suspense date for Notice of

Appeal (60 days from date of Order): _____

Instruction to Clerk:

_____ Open file.

_____ Send for medical.

_____ Send for employment records.

_____ Make an appointment with Dr. _____

for client.

Appendix C[17]

Authorization to Release Information

I, _____, do hereby authorize [insert name of agency, physician, or organization] to release to my attorney, _____, who is representing me in a Social Security Claim, any and all information regarding me which he requests, and to permit my attorney to inspect and examine any records pertaining to me which may be in your possession. I hereby waive any privilege I might have in connection with such information. A copy of this release shall be afforded the same force and effect as the original.

You are further requested to disclose no such information to any other person without written authority from me to do so. I hereby revoke all previous authorizations given for the release of information for any purpose whatsoever.

Dated this _____ day of _____, 19___.

_____
[Name]

_____
[Address]

_____
[Social Security or other identification number]

[Proper notary affidavit should follow]

[17] Typically, general release authorizations will be required to obtain medical information, information about the claimant contained in the records of any municipal, county, state or federal governmental agency, social security information, information in financial records, information in school records, employment information, and insurance information. This general "blanket" release is sufficiently broad to authorize the release of any information held by such entities.

The Advocacy Section

Trial Counsel Forum

Trial Counsel Assistance Program, USALSA

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Protecting the Child Witness: Avoiding Physical Confrontation With the Accused

Captain David F. Abernethy
OSJA, Fort Knox, Kentucky

Introduction

Few crimes are as traumatic to a child victim as sexual abuse or exploitation by an adult.[1] Unfortunately, when such abuse becomes known, the child victim may find that the trauma involved in her[2] experience has only begun. The extended involvement with law enforcement and the criminal justice system that follows brings additional trauma to the victim under even the best of circumstances.[3]

One of the most traumatic moments for the child is the moment when she is called upon to come into court and testify. Perhaps most difficult is the requirement that she testify while the person who victimized her—often her own father, stepfather, or another relative—sits in the courtroom and watches. Courts[4] and experts in the field of child sexual abuse[5] have recognized that it can be extremely difficult, if not impossible, for a young child to come to a trial

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[1] Apart from the obvious emotional trauma associated with the event itself, the child victim of sexual abuse may experience severe long-term effects. Literature from experts in the field who treat such victims indicates that these effects may include depression, psychosis, attempts at suicide, poor performance in school, delinquent behavior, sexually-oriented "acting out," and difficulties in forming normal heterosexual relationships as adults. Cohen, *The Incestuous Family Revisited*, 64 Soc. Casework 154, 158–59 (1983). *See also* Gomes-Schwartz, Horowitz & Sauzier, *Severity of Emotional Distress Among Sexually Abused Preschool, School-Age and Adolescent Children* 36 Hosp. & Community Psychiatry 503 (1985); Krener, *After Incest: Secondary Prevention?*, 24 J. Am. Acad. Child Psychiatry 231 (1985).

[2] It is recognized that child victims of sexual abuse may be male or female; however, the literature suggests that, particularly in the area of incest offenses, the female child is most often victimized, generally by a father, stepfather or other male adult known to her. Conte, *Progress in Treating the Sexual Abuse of Children*, 29 Soc. Work 258, 258 (1984) [hereinafter cited as Conte]; Hoorwitz, *Guidelines for Treating Father-Daughter Incest*, 64 Soc. Casework 515, 515 (1983); Taubman, *Incest in Context*, 29 Soc. Work 35, 35 (1984). Accordingly, the victim is referred to in this article by the female pronoun, and the accused by the male.

[3] Common sense indicates that it would be difficult for any child to "tell on" her father or stepfather, or any adult, to strangers. Moreover, the experience of experts in the field of child sexual abuse indicates that the child victim is usually told by the abuser not to tell anyone about what has happened, and after the abuse becomes known, the child is almost invariably pressured by the abuser or even both parents to recant the allegations of abuse. *See, e.g.*, Conte, *supra* note 2, at 260; Weiss, *Incest Accusation: Assessing Credibility*, 11 J. Psychiatry & L. 305, 312 (1983); Weiss & Berg, *Child Victims of Sexual Assault: Impact of Court Procedures*, 21 J. Am. Acad. Child Psychiatry 513 (1982) [hereinafter cited as Weiss & Berg].

[4] State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330, 1334 (1984); State v. Strable, 313 N.W. 2d 497, 500 (Iowa 1981). *See also* Parisi v. Superior Court, 192 Cal. Rptr. 486, 487 n.1 (Cal. App. 1983).

[5] *See* Conte, *supra* note 2, at 260; Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 984 (1969) [hereinafter cited as Libai]; Weiss & Berg, *supra* note 3, at 515; Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. Mich. J.L. Ref. 131, 134 (1981) [hereinafter cited as Note, *Parent-Child Incest*]. *See generally* R. Kempe & C. Kempe, The Common Secret: Sexual Abuse of Children and Adolescents 85 (1984).

or hearing and tell a group of strangers what happened to her, while her abuser sits and watches.[6]

In this context, the chances of successful prosecution can be increased, and the emotional trauma to the victim decreased,[7] if the victim can be given an opportunity to tell her story without being physically confronted by the accused. This can be accomplished in several different ways. The court or investigating officer can place a screen or other physical barrier between the witness and the accused. This allows the accused to hear the testimony and consult with counsel, but not to see the witness or be seen by her. Another method is to have the witness testify before a television camera. The accused is then able to hear and watch on a monitor, either from behind a barrier or from another room, and to signal his counsel with a buzzer or light when he wants to consult with him.[8]

Allowing the victim to testify while denying the accused the right to physically confront her raises substantial issues concerning the accused's constitutional[9] and statutory[10] rights to confront the witnesses against him. This article analyzes the nature and scope of the confrontation right as it relates to the accused's purported right to physically confront adverse witnesses;[11] discusses specific cases in which victims of sexual or other violent offenses have been allowed to testify without being physically confronted by the accused; and argues that permitting the child victim of sexual abuse to testify without physical confrontation by the accused is constitutionally permissible, and will likely be upheld by the appellate courts, if the trial counsel insures that an adequate record is developed to justify the procedures used.

The Nature and Scope of the Confrontation Right

In the normal course of events at a trial or pretrial investigation, witnesses come into open court and give their testimony in full view of all participants, including the accused. An accused who is denied the normal opportunity to physically confront adverse witnesses can be expected to object to the procedure as violating his confrontation rights in two respects. First, he may argue that he has a basic right to *physically* confront the witnesses against him. Second, he may contend that blocking his view of a witness infringes his right of cross-examination by preventing him from observing aspects of the witness' demeanor that would help him assist his counsel to effectively cross-examine.

In analyzing the first claim it is essential to look behind the promise of the sixth amendment that the accused shall be permitted "to confront the witnesses against him . . . ." Despite the apparent promise of these words, the Supreme Court has never held that the confrontation clause includes a right of the accused to physically confront adverse witnesses.

According to Professor Wigmore, the confrontation right has two purposes.[12] The first and most important is to promote the discovery of truth by insuring that the accused has a full opportunity to test the witness' evidence through cross-examination. A second and less significant purpose is to insure that the witness is physically confronted, not by the accused, but by the trier of fact, so that the factfinder can observe the witness' demeanor. Analyzing some of the earliest cases which dealt with the criminal defendant's confrontation rights, Wigmore explicitly rejected the proposition that physical confrontation of the witness by the *accused* is a significant goal of the confrontation clause.[13]

The Supreme Court has accepted Wigmore's view.[14] In *Pointer v. Texas*,[15] the Court held the use of a transcript of prior testimony which had been taken at a preliminary hearing where the defendants were not represented by counsel to be a violation of the confrontation right. The Court concluded that the defendants did not have an adequate opportunity to cross-examine the declarant, as they did not have counsel to assist them. The Court observed that "a major reason underlying the constitutional confrontation right is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."[16]

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[6] DeJong, *Medication Evaluation of Sexual Abuse in Children*, 36 Hosp. & Community Psychiatry 509, 511–12 (1985); Finkelhor, *Removing the Child—Prosecuting the Offender in Cases of Sexual Abuse*, 5 Child Abuse & Neglect 195, 203 (1983) [hereinafter cited as Finkelhor]; Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177, 196 (1983) [hereinafter cited as Summit]; Weiss & Berg, *supra* note 3, at 516–17.

[7] While trial counsel generally see successful prosecution of the case at hand as their primary goal, they must also be concerned with avoiding unnecessary trauma to the victim, who has already suffered tremendously because of the accused's crimes. Indeed, trial counsel have an affirmative duty to respect the rights and interests of the victim to the greatest extent possible. *See* Dep't of Army, Reg. No. 27–10, Legal Services-Military Justice, para 18–2 (15 Mar. 1985).

[8] The use of television obviously requires considerably more technical coordination than simply putting a screen up in front of the accused. It adds two advantages, however. First, it limits the accused's ability to argue that he was deprived of effective cross-examination through inability to observe the witness as well as hear her. *See infra* notes 27–29 and accompanying text. It also gives trial counsel the potential to preserve the witness' article 32 testimony on videotape. Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter cited as UCMJ]. Such a videotape would obviously have a greater impact than the reading of a transcript by counsel. Videotapes of depositions or other former testimony are admissible as verbatim testimony and may be shown to court members if the proper foundation is established. United States v. Kelsey, 14 M.J. 545, 546 (A.C.M.R. 1982); United States v. Dempsey, 2 M.J. 242, 243–44 (A.F.C.M.R.) *petition denied*, 2 M.J. 149 (C.M.A. 1976). *See also* Mil. R. Evid. 804(b)(1), 1001(2).

[9] U.S. Const. amend. VI.

[10] UCMJ art. 32(b).

[11] For an excellent general analysis of the confrontation right in the military system, *see* Gilligan & Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation*, 101 Mil. L. Rev. 1 (1983).

[12] J.H. Chadborne, *Wigmore on the Law of Evidence* § 1395, at 150–54 (Rev. ed. 1974).

[13] *Id.* § 1395, at 154.

[14] The section of Professor Wigmore's treatise cited in the previous footnote was cited by the Court with approval in Douglas v. Alabama, 380 U.S. 415, 418–19 (1965), and in Pointer v. Texas, 380 U.S. 400 (1965).

[15] 380 U.S. 400 (1965).

[16] *Id.* at 406–07.

The Court employed a similar analysis in *Barber v. Page,*[17] in which the preliminary hearing testimony of a co-defendant was held to have been improperly admitted against the defendant after that co-defendant absented himself from the jurisdiction before trial.[18] The same principle formed the rationale for the holding in *Douglas v. Alabama.*[19] There the Court condemned the use against one defendant of a statement allegedly made by his co-defendant, who avoided cross-examination at trial by invoking the privilege against self-incrimination.[20] In both cases, the Court emphasized that the accused's confrontation rights were violated because the evidence used was not adequately tested by cross-examination.

The Court has also endorsed the concept that a second but less critical purpose of the confrontation right is to provide the *tribunal* an opportunity to observe the witness. In *Mattox v. United States,*[21] the Court observed that, by exercise of his confrontation rights, "the accused has an opportunity . . . of compelling him [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[22] Like Wigmore, the Court has viewed this purpose as subordinate to the primary goal of providing an adequate opportunity for cross-examination. In some cases, the Court has held that the demands of the confrontation clause may be met even though the witness who provided the evidence was not present at trial.[23]

Also, like Wigmore, the Court has rejected the premise that the confrontation right includes a basic right of the accused to physically confront adverse witnesses. In *Davis v. Alaska,*[24] the Court again emphasized the right of cross-examination in its confrontation analysis and overturned a conviction based upon the trial court's refusal to allow cross-examination relating to the juvenile record of a key prosecution witness.[25] In the course of its discussion, the Court quoted Wigmore's comment that confrontation is required " 'not for the idle purpose of gazing upon the witness, but for the purpose of cross-examination . . . .' "[26]

Neither Wigmore's analysis nor the Court's decisions give any significant support to the proposition that the confrontation clause incorporates a specific right of the accused to physically confront adverse witnesses. The accused may nonetheless argue that a right which is central in the Court's confrontation analysis—the right of cross-examination—is impaired where the accused is unable to observe the demeanor, facial expression, and "body language" of the witness, and communicate his observations to his counsel for use during cross-examination.[27] Responding successfully to this argument requires a focus on two separate questions. First, is it reasonable to conclude that inability to see the witness will significantly impair effective cross-examination? Second, if there is some modest impairment, is there some countervailing interest which may justify the slight burden upon the accused's confrontation rights?

The first question remains unanswered in the decided cases. In one case, however, the Supreme Court held that excluding the defendant from a portion of his own trial did not infringe his constitutional rights where that phase of the trial was of such a nature that, by his presence, he could not have materially assisted in his defense. In *Snyder v. Massachusetts,*[28] the defendant was excluded from a jury view of the crime scene. The Court held that this was not an infringement of any constitutional right because there was nothing the accused could have done to assist in his defense had he been there.[29] Cross-examination is a function primarily controlled by counsel, not the accused. The argument can thus be made that an accused who cannot see the witness, but who can hear the testimony and consult with counsel, is in a position to assist in that endeavor as effectively as one who can see the witness.

If the accused alleges infringement of his cross-examination rights, trial counsel should not accept as fact the speculative premise that observation of the witness somehow makes the accused better able to assist counsel in cross-examination. Instead, trial counsel should put the burden[30] on the accused to offer something more than bare assertion that physical confrontation of the witness by the

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[17] 390 U.S. 719 (1968).

[18] *Id.* at 720.

[19] 380 U.S. 415 (1965).

[20] *Id.* at 416.

[21] 156 U.S. 237 (1897).

[22] *Id.* at 242–43.

[23] Ohio v. Roberts, 448 U.S. 56 (1980); Douglas v. Alabama, 380 U.S. at 418–19.

[24] 415 U.S. 308 (1974).

[25] *Id.* at 320–21.

[26] *Id.* at 315–16, quoting 5 J. Wigmore, Evidence § 1395, at 123 (3d ed. 1940).

[27] This issue is framed with a factual assumption that the accused, although unable to see the witness during her testimony, is able to hear her testimony and freely consult with counsel during direct and cross-examination. Any arrangement that infringed upon the ability of the accused to hear the witness or consult with counsel would undoubtedly run afoul of due process limitations. On the other hand, an arrangement which physically isolated the accused from the witness but which allowed him to see as well as hear her—such as closed-circuit television—would obviate the argument that the accused's inability to observe the witness precluded him from assisting his counsel in cross-examination.

[28] 291 U.S. 97 (1934).

[29] *Id.* at 108.

[30] The proponent of a motion ordinarily bears the burden of proof, by a preponderance of the evidence, of facts necessary to sustain it. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 905(c)(2)(A) [hereinafter cited as MCM, 1984, and R.C.M. respectively]. *See also* United States v. Hershey, 20 M.J. 433 (C.M.A. 1985).

accused is necessary for effective cross-examination by counsel.

Trial counsel should also emphasize that the confrontation right is not absolute and may have to accommodate other interests in particular cases.[31] The Court recently observed in *New York v. Ferber*[32] that the prevention of sexual abuse and exploitation of children is a "governmental objective of surpassing importance."[33] In *Ferber*, the Court upheld, in the face of a first amendment challenge, a state statute which prohibited dissemination of materials which depicted children in a sexual manner but which were not legally "obscene."[34] Although decided in a different context, *Feber* is important because it establishes that combating sexual abuse of children is an interest of such compelling importance that even fundamental constitutional rights may be limited to some degree to accommodate that interest.[35]

Chambers and *Ferber* give legal support to the argument that, even if preclusion of physical confrontation between witness and accused is a limitation upon the confrontation right, that limitation is justified by the compelling interest of insuring full and fair investigation or adjudication of the charges with a minimum of trauma or embarrassment to the victim.[36] Of course, the success of this argument will depend upon the factual record developed to support it. It is easy to argue that a full and fair investigation or adjudication of the charges requires the production of full, complete, and truthful testimony by the victim. Trial counsel must also be prepared, however, to show that the steps taken to prevent physical confrontation between accused and victim are at least reasonably calculated to promote the production of such testimony, and thus serve the purposes of the confrontation right.[37]

To some degree, counsel may be aided by literature produced by both legal commentators and social workers which discusses the trauma experienced by the victim who must face the accused while testifying.[38] The literature also indicates that accurate resolution of allegations of sexual abuse if often frustrated by pressure put on the child by parents to recant the allegations.[39] Specific evidence that the particular victim involved is unable or at least reluctant to testify in the presence of the accused, however, is a more powerful means of supporting the preclusion of physical confrontation.[40]

Finally, it is important to keep in mind the stage of the proceedings at which physical confrontation is precluded. Many cases involving serious incidents of sexual abuse of children will be referred to general courts-martial, which means the victim will probably testify for the first time at a pretrial investigation.[41] This may be the point in time when it is most helpful to allow the child to testify without having to face the accused.[42] Defense counsel will likely object to this procedure,[43] but if the objection is unsuccessful

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[31] Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

[32] 458 U.S. 747 (1982).

[33] *Id.* at 757.

[34] *Id.* at 753. The Supreme Court established constitutional standards under which material could be held to be obscene, and therefore unentitled to the protection of the first amendment, in Miller v. California, 413 U.S. 15 (1973).

[35] There is no question that the free expression rights secured by the first amendment are among the most important and fundamental rights under the Constitution. *See e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[36] In Snyder v. Massachusetts, 291 U.S. 97, 122, (1934), the Supreme Court stated: "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Trial counsel, when arguing in support of actions which arguably limit the accused's confrontation rights to some modest degree, should not neglect to mention the victim's rights, as well as discovering the truth, as important factors to be considered in striking the balance.

[37] In making this argument, trial counsel should remind the court of the distinction between the confrontation right and some other rights of the accused. Some fundamental rights of the criminal accused, such as the right against self-incrimination, are protected because they are fundamental to the dignity of the individual, even though protection of these rights may frustrate the truth-finding goal of the trial process. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966). The fundamental purpose of the confrontation right, however, is to promote the truth-finding process, primarily through its principal component right of cross-examination. Chambers v. Mississippi, 410 U.S. at 295; Dutton v. Evans, 400 U.S. 74, 89 (1970). When the accused argues that the confrontation right includes a guarantee that he be allowed to physically confront adverse witnesses, trial counsel should oppose that argument by showing that *avoiding* such physical confrontation will better promote the truth-finding goal which the confrontation clause is designed to serve.

[38] *See supra* notes 4 and 5.

[39] Summit, *supra* note 6, at 186–87. *See also* State v. Sheppard, 484 A.2d at 1333; Finkelhor, *supra* note 6, at 203.

[40] The most appropriate and effective means of insuring that these arrangements are made at the pretrial investigation is for the appointing authority to explicitly instruct the investigating officer on what he or she is to do, and who he or she is to coordinate with for technical arrangements. Giving such instructions to an investigating officer is not improper. R.C.M. 405(b). *See* United States v. Smelley, 33 C.M.R. 516, 522–23 (A.B.R. 1963).

[41] UCMJ art. 32. Although the child, as a civilian, will not be subject to subpoena at an article 32 investigation, the investigating officer will be required in most cases to make all reasonable efforts to insure the victim's presence at the investigation, because her testimony will almost invariably be crucial to the charges. *See, e.g.*, United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976).

[42] At this point in the case, the victim will have told her story, probably to law enforcement personnel, the prosecutor and social workers, but will not have testified in a formal proceeding. Although trial counsel should try to explain in advance what will happen and how the proceedings will work, the procedure and environment will likely be foreign and intimidating to the child. If the child is able to testify in a less intimidating atmosphere, without having to face the accused, she will probably do better and gain confidence, and then may be able to testify effectively at trial even in front of the accused, if the military judge so requires.

[43] Failure to object will waive any defect in the pretrial investigation. R.C.M. 405(h)(2), (k).

counsel will probably attack the sufficiency of the article 32 investigation by motion raised at trial.[44]

Trial counsel must emphasize the narrower scope of the statutory confrontation right[45] at a pretrial investigation, as compared to the constitutional right at trial. The Supreme Court has explicitly stated that the confrontation right is not as broad at pretrial hearings as at trial.[46] The Court of Military Appeals has recognized a similar distinction between the statutory confrontation right which applies to pretrial investigations and the constitutional right which attaches at trial.[47] Article 32 and Rule for Courts-Martial 405 underscore this point, particularly in the differing standards on production of witnesses and consideration of documentary evidence in lieu of live testimony.[48] Even if trial counsel is unable to prevent physical confrontation between accused and victim at trial, he or she still has a strong argument to defend any decision to prevent such confrontation at the article 32 investigation.

Case Law and Statutes on the Denial of Physical Confrontation Between Accused and Victim

In addition to the cases discussing the theory of confrontation in general, there are cases in which denial of physical confrontation between accused and witness has been asserted to be a denial of the constitutional confrontation right. Although only a few cases have addressed the issue,[49] several are set in the specific context of the child sexual abuse victim as witness. In addition, this issue has been addressed by statute in several states.

Unfortunately, the military appellate courts have not addressed this specific issue. One federal court has dealt with a somewhat similar issue. In *United States v. Benfield,*[50] the government took the videotaped deposition of an adult woman who had been kidnapped. Based upon testimony from the victim's psychiatrist concerning her mental condition, the court directed that the defendant not be present in the room with the victim. Counsel were present with the victim, and defense counsel cross-examined her, but the defendant observed the testimony from another room on a TV monitor. The victim was not aware that he was present or that he was observing her testimony. The defendant signaled his counsel, using a buzzer, when he wanted to consult with him.[51]

At trial, the victim was unavailable to testify and the videotaped deposition was introduced into evidence against the defendant. The Eighth Circuit held this use of the deposition to be a violation of the defendant's confrontation right. The court examined the language of a number of older Supreme Court cases[52] and concluded that face-to-face confrontation between accused and witness was a significant feature of the constitutional confrontation right, although conceding that more recent cases have "use[d] . . . other language" to delineate the confrontation right.[53] The court then concluded that physical confrontation was mandated because of its perceived psychological effect on the witness:

> The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel.[54]

The court provided no citations, empirical or legal, to support this proposition, which was central to its holding in the case. Moreover, it gave little attention to the substantial evidence of the victim's psychiatric problems and resulting inability to testify in the defendant's presence. In any event, the decision is one of limited applicability to child sexual

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[44] *See* R.C.M. 405, 906(b)(3). An accused who is denied a fundamental pretrial right at an article 32 investigation is entitled to relief in the form of a new pretrial investigation regardless of whether he can show that the relief would benefit him at trial. United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). Where no substantial pretrial right is denied, however, the accused is not entitled to relief based upon a defective article 32 investigation unless specific prejudice is shown. United States v. Lopez, 20 C.M.A. 76, 77, 42 C.M.R. 268, 269 (1970); United States v. Cunningham, 12 C.M.A. 402, 405, 30 C.M.R. 402, 405 (1961).

If arrangements which are made at a pretrial investigation to preclude physical confrontation are challenged by motion at trial, trial counsel should first argue that there is no right, substantial or otherwise, of the *accused* to physical confrontation with the witness. Trial counsel should also argue that, even if the arrangements infringed the accused's confrontation rights in some slight way, that infringement did not rise to the level of a "deprivation" of the right. The latter argument puts the burden back on the accused to show specific prejudice, even if the actions taken are found to be improper. To date, no published military decision has addressed the issue of deprivation of physical confrontation between victim and accused at a pretrial investigation.

[45] UCMJ art. 32(b) entitles the accused to confront and cross-examine "available" witnesses.

[46] Barber v. Page, 390 U.S. at 725.

[47] United States v. Chuculate, 5 M.J. 143, 145 n.7 (C.M.A. 1978).

[48] R.C.M. 405(g)(4)(B)(i) allows consideration of sworn statements at the article 32 investigation, even over the accused's objection and with no opportunity for cross-examination, if the witness is not reasonably available. A witness may be considered not reasonably available if the significance of his testimony would be outweighed by the expense, inconvenience, and delay involved in obtaining it. R.C.M. 405(g)(1)(A). Clearly, the rule allows at least some evidence to be considered at a pretrial investigation, without any confrontation or cross-examination, which could not constitutionally be considered at trial. *Cf.* Ohio v. Roberts, 448 U.S. 56 (1980) (discussing witness unavailability at trial).

[49] *See* Annot., 19 A.L.R. 4th 1286 (1983).

[50] 593 F.2d 815 (8th Cir. 1979).

[51] *Id.* at 817.

[52] *Id.* at 818–19 (quoting Dowdell v. United States, 221 U.S. 325, 330 (1911)); Kirby v. United States, 174 U.S. 47, 55 (1899); and Mattox v. United States, 156 U.S. 237, 243–44 (1895).

[53] *Id.* at 821.

[54] *Id.*

abuse cases as the victim in *Benfield* was an adult woman, not a child, and was not the victim of a sexual offense.[55]

Closer to the point is a state decision, *Herbert v. Superior Court.*[56] In *Herbert*, the defendant, charged with sexually abusing his five-year-old stepdaughter, challenged the validity of his preliminary hearing. At that hearing the girl "was initially unable or reluctant to testify." The magistrate then seated the witness so the defendant was able to hear her and confer with counsel, but could not see her. The witness could not see the defendant.[57]

The court held this arrangement violated the defendant's federal constitutional right to confront the witnesses against him. Conceding that the focus of the Supreme Court's recent decisions had been upon cross-examination, the court nonetheless concluded, based upon language in older cases,[58] that the confrontation clause also demanded a face-to-face meeting between witness and defendant.[59] The court conceded that a "delicate" situation was presented where a five-year-old girl was asked to testify to matters as personal and embarrassing as sexual abuse.[60] Nonetheless, the court concluded that its view of the confrontation right must prevail:

> The historical concept of the right of confrontation has included the right to see one's accusers face-to-face, thereby giving the fact-finder the opportunity of weighing the demeanor of the witness when forced to make his or her accusation before the one person who knows if the witness is truthful. A witness' reluctance to face the accused may be the product of fabrication rather than fear or embarrassment.[61]

This statement justifying the court's holding seems somewhat illogical. The ability of the *defendant* to stand face-to-face with the witness has little to do with the *factfinder's* ability to assess the witness' demeanor. The court might have been referring to the type of psychological pressure on the witness which the *Benfield* court conceived as the product of the accused's presence. As for the concern that reluctance to face the defendant may stem from a desire to ease the difficulty of fabrication, this is a conclusion of questionable validity in the case of a five-year-old child describing acts of sexual abuse against her.[62] Both points are unsupported in the *Herbert* opinion by any citation of legal or empirical authority.

The *Herbert* opinion also glossed over with minimal discussion the serious issue of the victim's young age and relationship to the defendant, admitting that it made her testimony a "delicate" situation but assigning no apparent importance to that fact in deciding the case. Additionally, the court relied heavily upon decades-old and factually inapposite[63] decisions of the Supreme Court in finding a right of physical confrontation between defendant and witness, while ignoring the clear emphasis of more recent cases upon the primary importance of cross-examination.[64]

Other state decisions have adopted a less stringent view of the confrontation right. In *State v. Strable,*[65] the Iowa Supreme Court sanctioned an arrangement under which the defendant's fifteen-year-old stepdaughter was allowed to

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[55] *See infra* note 73.

[56] 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981).

[57] *Id.* at 664–65, 172 Cal. Rptr. at 851.

[58] *Id.* at 667, 172 Cal. Rptr. at 853. The *Herbert* court relied upon the same cases cited in *Benfield, supra* note 52.

[59] 117 Cal. App. 3d at 671, 172 Cal. Rptr. at 855. A concurring opinion, while agreeing with the holding that the defendant's confrontation right was violated, dissented from the view that the holding was properly based upon the federal constitution. The concurring justice concluded that the decision should have based upon state statute. *Id.* at 671–72, 172 Cal. Rptr. at 855–56 (Puglia, J., concurring). California law requires witnesses at a pretrial hearing to be examined "in the presence of the defendant." Cal. Penal Code § 865 (West 1970).

[60] 117 Cal. App. 3d at 668, 172 Cal. Rptr. at 853.

[61] *Id.* at 671, 172 Cal. Rptr. at 855.

[62] In *Sheppard,* 197 N.J. Super. 411, 484 A.2d 1330 (1984), discussed later in this article, *see infra* notes 68–74 and accompanying text, the court discussed testimony of Dr. Robert Sadoff, a forensic psychiatrist, offered by the state to support a request for closed-circuit testimonial arrangements that would have precluded physical confrontation of the victim by defendant. Dr. Sadoff testified that while an adult witness is likely to be impressed by the overtones of authority eminating from the courtroom setting and personnel, and is thus more likely to testify truthfully, a child called to testify about sexual abuse by a relative will more likely experience aggravation of existing feelings of guilt, trauma and anxiety, due to the courtroom atmosphere, thus reducing her ability to testify truthfully and accurately. 484 A.2d at 1332.

[63] *See supra* notes 52 and 58. *Dowdell v. United States* involved a challenge to the validity of a lower courts' certification to an appellate court of facts relating to the conduct of the trial in the lower court. The Supreme Court held that this need not be done in the presence of the accused because the certification was not in any legal sense testimony relating to guilt or innocence. 221 U.S. at 330–31. *Kirby v. United States* condemned as a violation of confrontation rights the use of a record of conviction of larceny of other individuals against a defendant charged with receiving stolen property, as substantive evidence that the property at issue was stolen. 174 U.S. at 54–55. *Mattox v. United States* sanctioned the use at a retrial of the testimony of witnesses given at the defendant's first trial, where the witnesses had been subject to cross-examination in the first trial, but had died in the interim. 156 U.S. at 242–43.

[64] *Herbert* stands somewhat in contrast to another decision of the California District Court of Appeal. In Parisi v. Superior Court, 192 Cal. Rptr. 486 (Cal. App. 1983), an eight-year-old victim of sexual abuse was too embarrassed to testify openly in front of her father, so the magistrate allowed her to whisper her answers to him; he repeated them, with some paraphrasing or editorial comment, onto the record. The court found no violation of confrontation or cross-examination rights, even though the defendant lost some ability to observe facial expression and hear tone of voice. *Id.* at 491.

One other state decision which dealt with a situation somewhat similar to that presented in *Herbert* was State v. Mannion, 19 Utah 505, 57 P. 542 (1899). In that case a six-year-old girl whom the defendant, her father, had allegedly tried to rape told the judge she was "afraid to tell" and "afraid of my papa." The court allowed the child to testify facing the jury and with her back to the defendant, while he was seated in the rear of the courtroom where he could neither hear nor see the witness. *Id.*, 57 P. at 542. The Utah Supreme Court, noting that her testimony was critical to the prosecution's case, held that the arrangement violated the accused's state law confrontation right. *Id.*, 57 P. at 543–44. The fact that the defendant could not hear the witness' testimony or readily consult with counsel distinguishes the case from the modern decisions on both sides of this issue.

[65] 313 N.W.2d 497 (Iowa 1981).

testify at his trial on sexual abuse charges with a blackboard placed between her and the defendant. She had told the court that it would be "difficult or embarrassing" for her to testify while looking at or being looked at by the defendant, although she also "reluctantly told defendant's attorney that it would not be easy but she could testify without the blackboard." Her younger sister chose to testify without the blackboard.[66]

The court rejected the defendant's argument that the arrangement violated his confrontation rights. Noting that he had fully cross-examined the witness, the court concluded that his argument could only prevail if the confrontation clause guaranteed him a "visual, face-to-face confrontation" with the witness. Analyzing the Supreme Court's decisions and the discussion in Wigmore's treatise, the court concluded that cross-examination and face-to-face confrontation of the witness by the *tribunal,* not physical confrontation by the accused, were the legitimate objects of the clause's guarantee.[67]

The *Strable* court, although cogently analyzing the confrontation right, spent little time discussing the unique difficulties facing a child called upon to testify about sexual abuse in the presence of her abuser. By contrast, the court in *State v. Sheppard*[68] went into considerable depth in its discussion of this issue. In *Sheppard,* a New Jersey appeals court approved a decision to allow defendant's ten-year-old stepdaughter to testify at his trial on sexual abuse charges through closed-circuit television. The girl was placed in a room with the prosecutor and defense counsel, where she was examined and cross-examined. The defendant, judge and jury remained in the courtroom, watching and listening on monitors. The defendant had a private audio connection with his counsel for consultation.[69]

The court reviewed in detail evidence offered by the state to support its request, including testimony by a forensic psychiatrist that the witness probably would not be able to testify accurately if confronted by the defendant, and would probably be deeply traumatized by such a confrontation if she did testify. The trial court also received testimony from two experienced prosecutors who related that most child sexual abuse cases were dropped because the victims became traumatized and were unable to testify.[70]

The court concluded that the traumatic impact upon victims of testifying was a serious problem endemic to child sexual abuse cases:

> For obvious reasons, only one witness with personal knowledge is available to prove the State's case in almost every child abuse prosecution: the child victim. These victims, as shown by the State's proofs, have been traumatized by their subjection to the abuse. They become so further traumatized by the prospect of testifying in front of their abusers that they cannot speak about the central happenings or can do so only with great difficulty and doubtful accuracy. The in-court experience may cause further lasting emotional harm.[71]

The court also noted the adoption of statutes in a number of states allowing videotaped testimony by child victims of sexual abuse.[72]

The court then turned to the defendant's confrontation claim, and distinguished *Benfield* and *Herbert.*[73] The court agreed with the *Strable* court that cross-examination and observation of the witness' demeanor by the tribunal are the main requisites of constitutional confrontation. The court concluded that, in this context, the rights of the victim and the ultimate goal of obtaining the truth justified whatever "modest erosion" of the confrontation right would result from the making of special arrangements.[74] The *Sheppard* decision is significant because of its lengthy and well-reasoned analysis, not only of the confrontation right but also of the particular problems faced by a child witness in sexual abuse cases, and the usefulness of television technology as a partial solution.

These decisions are at least in part a response to persistent calls from some legal writers and commentators who have argued that the child sexual abuse victim cannot be expected to give reliable evidence and emotionally survive the process unless special arrangements are made to reduce the traumatic impact of testifying, while preserving the accused's essential constitutional rights.[75] A number of states have recently sanctioned such special arrangements through statute. At least four states—Arizona, Kentucky, New

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[66] *Id.* at 500.

[67] *Id.* at 500–01. The court also rested its decision on the alternate ground that, because the two principal purposes of the confrontation right were served, any error was harmless beyond a reasonable doubt. *Id.* at 501.

[68] 484 A.2d 1330 (N.J. Super. 1984).

[69] *Id.* at 1332.

[70] *Id.* at 1332–33.

[71] *Id.* at 1334.

[72] *Id.* at 1336. *See also* infra notes 76–78 and accompanying text.

[73] The court distinguished *Benfield* on three factual points: first, a tape of a deposition, rather than live monitoring of testimony, was used; second, an adult rather than child victim was involved; and third, the offense was kidnapping rather than a sexual assault. *Id.* at 1337. It distinguished *Herbert* on the grounds that there was no record made in that case to support the determination that the child victim needed special arrangements, and also because there had been no request from the prosecution for the arrangement. *Id.* at 1338. The court also questioned the scope and viability of *Herbert* in light of the *Pairisi* decision. *Id. See* supra note 64.

[74] *Id.* at 1342–44.

[75] *See, e.g.,* Libai, *supra* note 5; Note, *Parent-Child Incest, supra* note 5; American Bar Association/Young Lawyers Division and National Legal Resource Center for Child Advocacy and Protection, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases,* Standard 1.4.4 and Commentary (Oct. 1982), at 11–12. *See also* Ahlgren, *Maintaining Incest Victims' Support Relationships,* 22 J. Fam. L. 483, 513–18 (1984); Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response,* 49 Mo. L. Rev. 251, 275–77 (1984); Comment, *Libai's Child Courtroom: Is it Constitutional?,* J. Juv. L. 31, 39 (1983); Note, *Incest: The Need to Develop a Response to Intra-Family Sexual Abuse,* 22 Duq. L. Rev. 901, 922–24 (1984).

Jersey and Texas[76]—have adopted statutes that allow the trial judge in a sexual offense case to direct that a victim under sixteen give her testimony either during trial by closed-circuit television or before trial by making a videotape which is then played at the trial. The child is questioned by the prosecutor and defense counsel in a room apart from the courtroom. No one else is present except for any person deemed by the court to be "necessary for the child's welfare," such as a parent, relative, or social worker. The defendant is permitted to observe and hear the child's testimony, but in a manner which insures that the child cannot hear or see the defendant.

Other states have enacted statutes which do not preclude physical confrontation by the defendant, but which at least allow the child in some instances to testify on videotape with only the judge, counsel, and defendant present, rather than in open court before the jury and spectators.[77] As yet, these new statutes have not been interpreted or challenged in any published decisions. Legislation has been introduced in Congress to encourage the adoption of such laws in the states by offering additional grants under federal child abuse prevention legislation.[78]

The statutes and cases just discussed apply to a broad spectrum of cases involving child victims of sexual abuse. In a subclass of these cases, however, another basis—waiver by the accused—may exist for denial of physical confrontation. The evidence may show that the accused has threatened to hurt the victim if she reveals his assaults. In a number of cases, federal courts have held that a defendant who procures the unavailability of a witness by threats or injury cannot object on confrontation grounds to use of prior statements or testimony of the unavailable witness. These courts analyze the issue from the viewpoint that the accused, by his conduct, has waived his confrontation right.[79] Even if the threatened child witness is actually available to testify, the same logic may support the conclusion that any arguable right the accused may have to physically confront the child witness has been waived.[80]

As previously noted, this issue has not yet been addressed in the military justice system by statute, rule,[81] or appellate decision. The military appellate courts have shown signs that they are cognizant of the special problems faced by the child sexual abuse victim as witness, however, and are willing to sanction reasonable departures from traditional modes of trial procedure to deal with those problems.

In *United States v. Hershey*,[82] the Court of Military Appeals affirmed a conviction where the trial judge closed the courtroom while the accused's thirteen-year-old daughter testified. The trial judge excluded the accused's escort and the baliff upon the request of the trial counsel. The trial counsel stated only that the exclusion would lessen the victim's embarrassment. The court held that the accused was not denied a public trial, although the trial was improperly closed without an evidentiary hearing, because the impact

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[76] Ariz. Rev. Stat. Ann. § 13–4253 (West. Supp. 1985); Ky. Rev. Stat. § 421.350 (Banks-Baldwin Supp. 1984); 1985 N.J. Laws 6 (West 1985); Tex. Crim. Proc. Code Ann. § 38.071 (West. Supp. 1985). The Kentucky statute provides in pertinent part:

> (3) The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.
>
> (4) The court may, on the motion of the attorney for any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection (3) of this section may be present during the taking of the child's testimony, and the person operating the equipment shall be confined from the child's sight and hearing as provided by subsection (3) of this section. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. . . .

Similar language appears in the Arizona, Texas, and New Jersey statutes.

[77] Ala. Code. § 12.45.047 (Michie 1984); Ark. Stat. Ann. § 43–2036 (Michie Supp. 1983); Cal. Penal Code § 1345 (West Supp. 1985); Colo. Rev. Stat. § 18–3–413 (Michie Supp. 1984); Fla. Stat. Ann. 90.90 (West Supp. 1985); Me. Rev. Stat. Ann. tit. 15, § 1205(2) (West Supp. 1985); N.M. Stat. Ann. § 30–9–17 (Michie 1978); S.D. Codified Laws Ann. § 23A–12–9 (Smith Supp. 1984).

[78] The Children's Justice Act, S. 140 & H.R. 1205, 99th Cong., 1st Sess., § 402(b) (3) (c) (1985), would require the states, in order to qualify for the additional grant funds to be authorized under the bill, to adopt reforms in child sexual abuse cases designed to improve chances of successful prosecution, and reduce trauma to the victim. For example, the bill allows videotaping victims' statements or testimony. The bill passed the Senate on voice vote on 1 August 1985 and is pending House action. 1 Cong. Index (CCH) (99th Cong., 1st Sess.) at 20,501.

[79] United States v. Mastrangelo, 693 F.2d 269, 272 (2d Cir. 1982); United States v. Thevis, 665 F.2d 616, 630 (5th Cir. 1982), *cert. denied*, 459 U.S. 825 (1983); Black v. Woods, 651 F.2d 528, 531–32 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979), *cert denied*, 449 U.S. 840 (1980); United States v. Carlson, 547 F.2d 1346, 1352–53 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). These courts agree that a finding of waiver based upon threats or intimidation requires an evidentiary hearing, although they split on the proper burden of proof. *Compare Mastrangelo*, 693 F.2d at 273–74 (preponderance of evidence standard), *and Balano*, 618 F.2d at 629 (same), *with Thevis*, 665 F.2d at 631 (clear and convincing evidence standard).

[80] State v. Sheppard, 484 A.2d at 1345.

[81] R.C.M. 801(a)(3) gives the military judge the authority, subject to the code and rules in the MCM, 1984, to "exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual. . . ."

[82] 20 M.J. 433 (C.M.A. 1985).

of the closure was minimal.[83] The court acknowledged that "it may be permissible under certain circumstances to exclude spectators during the testimony of a victim of tender years . . . on a case-by-case basis,"[84] and listed factors to be considered by trial judges.[85]

In *United States v. Johnson*,[86] the Army Court of Military Review sanctioned the practice of permitting a "moral supporter" to sit next to the child witness during his testimony. The trial court had allowed the aunt of a four-year-old boy to sit next to him as he testified to indecent acts committed upon him by his father.[87] Citing civilian precedent,[88] the court affirmed the conviction and "commend[ed] . . . the trial judge for using sound judicial procedure in dealing with the situation."[89]

In both *Johnson* and *Hershey*, the victims apparently testified in court in front of counsel, the trier of fact, and the accused. Nonetheless, the cases at least establish that the courts are aware that the child sexual abuse victim may have greater difficulty in testifying than an adult witness, and will allow trial judges reasonable latitude to deal with this fact as long as the accused's basic rights are protected. These cases give no indication that actions taken to preclude physical confrontation of the victim by the accused would not receive similar approval, if done in a manner which protects the accused's right to consult with counsel and, through counsel[90] to effectively cross-examine the victim.

Conclusion

The child victim of rape, sodomy, or other sexual assault who is frightened and reluctant to tell her story is not the exception; she is the rule. Trial counsel must be sensitive to this problem and be ready to consider the use of nontraditional means of taking and presenting evidence, not only to increase the chances of winning a conviction but also to minimize the traumatic impact of the proceedings upon the child. In many cases, the child will face the prospect of testifying in front of her abuser with tremendous feelings of fear or guilt. The trial counsel should consider asking the appointing authority in the case of a pretrial investigation, or the military judge at trial, to allow the witness to testify without a physical confrontation. Trial counsel must also insure that a solid factual record is made to justify any such decision in order to give the trial and reviewing courts the strongest possible basis upon which to approve the arrangements.

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[83] *Id.* at 436. In considering whether a criminal trial could be closed, the court also considered the first amendment right to access of the public and the press, and adopted the test enunciated by the Supreme Court in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984): the party seeking closure must advance an overriding interest that is likely to be prejudiced; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate finding supporting the closure to aid in review.

[84] *Id.*

[85] *Id.* These factors included whether the particular witness was unduly embarrassed, whether she was unable to testify coherently with the court open, whether there were any alternatives to closure, and whether the witness desired closure.

[86] 15 M.J. 518 (A.C.M.R. 1983).

[87] *Id.* at 519.

[88] The court cited Evers v. State, 84 Neb. 708, 121 N.W. 1005 (1909), in which a similar arrangement was sanctioned.

[89] 15 M.J. at 520.

[90] In a few rare cases the accused may exercise his constitutional right to self-representation. Faretta v. California, 422 U.S. 806 (1975). In such cases, any special arrangements designed to preclude physical confrontation between accused and victim would be difficult to reconcile with the central right of effective cross-examination.

Army Court Reexamines Excited Utterance Exception

The Army Court of Military Review, in *United States v. Keatts*,[1] has interpreted more fully the boundaries for the proper admission of excited utterances under Military Rule of Evidence 803(2),[2] especially where children are the declarants. Unfortunately, the Army courts in *Keatts* also highlighted the pitfalls a trial counsel may encounter when attempting to lay a proper and sufficient foundation under Rule 803(2).

In *Keatts*, the accused was a neighbor of the seven-year-old victim. Twice during one evening the victim's mother discovered the accused and the victim in his apartment engaging in sexually suggestive behavior. Each time the mother asked her daughter what she and the accused were doing and she replied they were either doing "nothing" or "gymnastics."[3] The mother also testified, however, that she had never seen her daughter look so scared. For that reason, the mother questioned her the next day, but had to ask her several times, and agree not to spank her, before she would tell her anything. When the victim did reply, she related several different incidents of sexual misconduct (including sodomy and carnal knowledge), only some of which had occurred the night before.

The Army court reversed, in part because the trial counsel had not made it clear when the victim's mother had questioned her. In her testimony, the mother said simply that she questioned her daughter after she had completed her homework the next day. The trial counsel failed to follow up this response. For example, if her homework had not been completed until the following evening, the twenty-four hour delay would make it more difficult to admit the statements as excited utterances. The Army court also based its decision on the fact that the mother's testimony was not limited to the acts which occurred the night before. The court was especially concerned that the victim had not told her mother about the earlier incidents at the first opportunity. Obviously, these earlier incidents had not caused the same "excited" or startled reaction as had the mother's discovery of the current incidents. Nevertheless, while the Army court concluded that reversal was required, it defined more clearly the basis for admitting statements under the excited utterance exception.

In an opinion preceding *Keatts*, the Army court had suggested that the passage of time, by itself, between a startling event and a hearsay statement, would not preclude admission of the excited utterance.[4] In *Keatts*, this point was made explicit. The Army court firmly held that the "unspecified interval between the startling event and [the] child's statement to her mother does not automatically preclude [the child's] statement from being an excited utterance, *if* the lack of capacity to fabricate is adequately established."[5] In further clarification, the court said that the "element of trustworthiness underscoring the excited utterance exception, particularly in the case of young children, finds its source primarily in the lack of *capacity* to fabricate rather than the lack of time to fabricate."[6]

In addition, the court addressed squarely whether a statement could qualify as an excited utterance if it was made in response to questioning. The court held that the fact that the child's statement "was in response to her mother's questioning [was] not controlling . . . but [was] a factor to be considered."[7]

The court concluded that the "key is whether [the child victim] was still under the emotional effect of her traumatic episode with appellant. . . . If her declaration lost the character of a spontaneous utterance and became a calm narrative of a past event, then the statement fell outside the hearsay exception."[8]

Consequently, because the trial counsel was unable to clearly demonstrate the crucial relationship between the child's statement made to her mother and the startling event, the Army court concluded that the "gap in time between the incidents of sodomy, indecent and lewd acts and carnal knowledge and T's declaration could have encompassed several months."[9] Under these circumstances, the Army court determined that the victim's declarations to her mother could not be considered spontaneous and therefore admissible.

The excited utterance exception to the hearsay rule provides trial counsel with tremendous leverage, particularly in cases involving the physical and sexual abuse of children. Even so, trial counsel must be prepared to provide all available evidence to satisfy the specific criteria established by the Rule. Read *Keatts* and beware.

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[1] 20 M.J. 960 (A.C.M.R. 1985).

[2] Mil. R. Evid. 803(2) [hereinafter referred to as Rule] provides that: "A statement relating to a startling event or condition *made while declarant was under the stress of excitement* caused by the event or condition [is not excluded by the hearsay rule]."

[3] *Keatts*, 20 M.J. at 961.

[4] United States v. Lemere, 16 M.J. 682, 687 (A.C.M.R), *petition granted*, 17 M.J. 34 (C.M.A 1983).

[5] *Keatts* 20 M.J. at 963 quoting People *in re* O.E.P., 654 P.2d 312, 318 (Colo. 1982) (emphasis added).

[6] *Id* (emphasis added).

[7] *Id.*

[8] *Id.*

[9] *Id.*

Pertinence of Identity in Physical Child Abuse Cases

In the April 1984 *Trial Counsel Forum,* TCAP suggested that Military Rule of Evidence 803(4)[10] (medical treatment exception) should permit the identification of the physical abuser in a child abuse case because it would be reasonably pertinent to medical treatment.[11] TCAP pointed out that the Army Court of Military Review in *United States v. Hill*[12] did not allow a physician to testify as to the accused's identity because the physician made it clear that identity was not relevant to the child's injury. TACP suggested that *Hill* would be decided differently if the physician had been more sensitive to the dynamics of child abuse: that an abuser will likely abuse again. Physicians who are sensitive to this phenomenon would testify that overall treatment must include removing the child from an abusive home environment. TCAP concluded that a doctor so testifying could demonstrate the "pertinence" of identifying the perpetrator of child abuse, and thus make his testimony as to identity admissible under Rule 803(4).

An appellate court in Michigan has adopted similar reasoning justifying the admission of a hearsay statement by a victim of sexual child abuse which identified the accused (stepfather) as the perpetrator. In *People v. Wilkins,*[13] the court allowed a physician to recount his nine-year-old patient's account of being sexually abused by her stepfather under the state's nearly identical version of Rule 803(4). In reaching its decision, the court concluded that identity was pertinent because the physician could not "adequately diagnose and treat the impact of sexual abuse on a child unless it was known that the source of the abuse was a family member."[14] The court further explained that part "of the treatment that was recommended for the victim was that she begin seeing a child psychologist and that she be removed . . . from her home."[15] The court determined that treatment would have been impossible had the physician not known that the source of the sexual abuse was the victim's stepfather. As a consequence, the court held that the statements elicited from the victim were "reasonably necessary to her diagnosis and treatment."[16]

Trial counsel should strongly consider using *Wilkins* to illustrate the scope of Rule 803(4) in a physical child abuse case where the victim, or the non-abusing parent, advises the physician of the identity of the perpetrator. While the defense may argue that Rule 803(4) does not provide a basis for admitting hearsay testimony which identifies the perpetrator of child abuse (relying on the holding in *Hill*), *Wilkins* provides an excellent basis for explaining to the military judge why identity is pertinent to medical treatment in a child abuse setting and thus admissible under Rule 803(4).

Service Connection in Off-Post Rapes of One Soldier by Another

In two recent cases, the Navy-Marine and Air Force Courts of Military Review addressed whether the off-post rape of one military member by another provided sufficient "service-connection" to confer subject-matter jurisdiction. While both courts decided that a combination of facts provided sufficient service-connection to confer jurisdiction over the respective offenses, they also suggested that the military status of the accused and the victim were factors which alone could establish jurisdiction over the off-post offense of rape.

The Navy-Marine Court of Military Review, in an unpublished opinion deciding a government appeal, opined that the inability of the military justice system to obtain the power to prosecute an accused who raped a female soldier off post would "seriously undermine 'military discipline and effectiveness.' "[17] The Navy court further opined that the "*known* military status of the victim . . . 'might be enough to cause such a high degree of military interest and concern as to compel jurisdiction in the military to try the accused.' "[18] The Navy court also suggested that, at a minimum, the status of the victim [a soldier] was strong evidence providing the military with a "distinct . . . interest."[19] Consequently, when the government showed that there was no civilian interest in the prosecution, the Navy court concluded that the balancing test to be applied between military and civilian interests was "totally one sided if not altogether unnecessary."[20] Accordingly, the Navy court reversed the trial judge's ruling which had dismissed the charge of rape for lack of subject-matter jurisdiction.

The Air Force court echoed the same sentiment in *United States v. Griffin,*[21] where appellant, an NCO, met the victim, another Air Force member, on base and went to the site of the crime, a motel room near the base. These facts, combined with the fact that the civilian jurisdiction "chose

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[10] Mil. R. Evid. 803(4) [hereinafter referred to as Rule 803(4)] provides that: "Statements made for purposes of medical diagnosis or *treatment* and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause *or external source* thereof insofar as *reasonably pertinent* to diagnosis or *treatment* are not excluded by the hearsay rule."

[11] Child, *MRE803(4)—Medical Treatment Exception,* Trial Counsel Forum, Apr. 1984, at 6.

[12] 13 M.J. 882 (A.C.M.R. 1982).

[13] 349 N.W.2d 815 (Mich. App. 1984).

[14] *Id.* at 817.

[15] *Id.*

[16] *Id.*

[17] United States v. Wilson, Misc. Dkt. No. 85–08 (N.M.C.M.R. 20 Aug. 1985), slip op. at 4.

[18] *Id.* (quoting United States v. Hedlund, 2 M.J. 11, 15 (C.M.A. 1976)).

[19] *Id.*

[20] *Id.*

[21] ACM 24752 (A.F.C.M.R. 5 Sept. 1985).

not to pursue the incident," provided sufficient service-connection to confer jurisdiction.[22] Nevertheless, the Air Force court took the opportunity to opine generally that "the military status of the parties [was] an important factor to be considered in determining whether the military['s interest] . . . overid[es] the interest of the civilian community . . .," and, specifically, that "the rape of one service member by another, no matter where it takes place, has a clear and recognizable impact on the morale, reputation and integrity of the Armed Forces."[23]

These two cases are important because they reflect an interest by military appellate courts in addressing the issue of sufficient service-connection derived simply by the military status of the rape victim. Trial counsel should recall that the Court of Military Appeals in *United States v Trottier*[24] concluded that while the "jurisdictional test of service connection [*Relford v. Commandant*],[25] may remain firm, its *application* must vary to take account of changing conditions in the military society."[26] In *Trottier*, the Court of Military Appeals concluded that the pervasive and deleterious effect of drug involvement among military members justified expanded jurisdiction over off-post drug offenses. By the same token, the Navy and Air Force courts are suggesting that a reappraisal of the importance of the victim's status (*Relford* factor 7[27]) in a rape case is more than justified considering the tremendous increase in the number of women in the armed forces since *Relford* was decided in 1971.

Trial counsel should take careful note of these developments in framing a basis for subject matter jurisdiction where the victim is a military member even when the civilian prosecutor has not categorically ruled out a state prosecution.

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[22] *Id.*, slip op. at 3.

[23] *Id.*

[24] 9 M.J. 337 (C.M.A. 1980).

[25] 401 U.S. 355 (1971).

[26] *Trottier*, 9 M.J. at 345.

[27] 401 U.S. at 365.

Administrative Credit for Pretrial Restriction

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Introduction

In *United States v. Mason,*[1] the United States Court of Military Appeals mandated that an accused by given day-for-day credit for the time spent in pretrial restraint when the restraint was equivalent to confinement. The Court of Military Appeals suggested a fairly simple analysis to determine whether an accused should be given this administrative credit. In its first published decision concerning this issue, *United States v. Smith,*[2] however, the Army Court of Military Review did not follow the *Mason* analysis, but took a much more complex approach to determine whether an accused should be given administrative credit for restraint prior to trial. Although the decision in *Smith* has introduced a degree of uncertainty and complexity in the area of credit for pretrial restraint, the Army Court of Military Review has relied on it as controlling precedent in this area in virtually ever subsequent case.[3]

One lesson that has been learned from appellate litigation to date is clear: the success or failure of pretrial restraint credit litigation will normally depend on the efforts of the defense counsel at trial. It is crucial, therefore, for trial defense counsel to fully investigate the conditions of the pretrial restraint and to develop the credit issue by appropriate motion at trial.[4]

This article will trace the historical development of credit for restriction in the military and provide information and advice to counsel seeking to obtain credit for their clients. The article is divided into three parts: first, a discussion of cases prior to *Mason;* second, an analysis of the decision in *Smith* and a review of cases after *Smith*; and, finally, some suggestions to trial defense counsel concerning credit litigation.

The *Mason* Decision

Mason was a logical "next-step" in the development of administrative credit for military prisoners. Support for this step was based on two separate, yet related, lines of cases.[5] The first equated certain types of restraint with confinement for speedy trial analysis under *United States v. Burton.*[6] The second line of case law was based on *United States v. Allen,*[7] which gave the military accused administrative credit for pretrial confinement. The court's goal in *Allen* was to insure that military sentencing procedures were consistent with those in the federal system.[8] *Allen,* therefore, is the underlying basis for giving the military accused administrative credit for severe forms of restriction. Where counsel is trying to equate his or her client's pretrial restriction to confinement for credit purposes, however, the first of these two lines of cases is of crucial importance.

One of the first cases equating a form of pretrial restraint to confinement for resolving a speedy trial issue was *United States v. Williams.*[9] In this case, Criminal Investigation Division (CID) investigators discovered what they believed to be false claims for pay and allowances made by Specialist Four Eddie Williams. Williams was restricted to his company area from 16 April until 30 August 1965. When charges were preferred on 9 November 1965, Williams' pass privileges were removed and not returned until 31 January 1966. Trial began on 26 February 1966.[10] Williams argued to the Court of Military Appeals that the 318-day delay between his initial arrest and the trial violated his right to speedy trial.[11] The court "charged" the government for the period of restriction and held[12] that the restriction to the company area was equivalent to the status of arrest and violated the protections of the Uniform Code of Military Justice.[13]

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[1] 19 M.J. 274 (C.M.A. 1985) (summary disposition).

[2] United States v. Smith, 20 M.J. 528 (A.C.M.R. 1985), (petition for review filed on other grounds)

[3] See *infra* note 34.

[4] Presently, this issue may be raised for the first time on appeal. The tenor of *Smith* indicates, however, that eventually the doctrine of waiver may be applied. *Smith,* 20 M.J. at 532-33. *Cf.* United States v. Martinez, 19 M.J. 744, 747 (A.C.M.R. 1984) (legality of confinement must be raised at trial). *See also* United States v. DiMatteo, 19 M.J. 903 (A.C.M.R. 1985) (additional credit for illegal pretrial confinement waived if not raised at trial).

[5] See *infra* notes 12, 17, and 21.

[6] 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[7] 17 M.J. 126 (C.M.A. 1984).

[8] *Id.* at 127–28.

[9] 16 C.M.A. 361, 37 C.M.R. 209 (1967).

[10] *Id.* at 362, 37 C.M.R. at 210.

[11] *Id.*

[12] *Id.* at 364, 37 C.M.R. at 212. The opinion refers only to the restriction to the company area. There is no indication whether or not Williams performed his normal military duties.

[13] Uniform Code of Military Justice art. 10, 10 U.S.C. § 810 (1982) [hereinafter cited as UCMJ].

In *United States v. Weisenmuller,*[14] the Court of Military Appeals again considered whether pretrial restriction was equivalent to arrest for purposes of UCMJ arts. 10 and 33. Weisenmuller was restricted to a barracks cubicle, the latrine, laundry room, operations area necessity store, mess hall, barber shop, his squadron hangar working area, mainside mess hall, and direct routes to and from these places. On weekdays during the period of this restriction, he was required to muster with the duty master-at-arms on an hourly basis from 1630 until 2130. On weekends and holidays he was required to muster at specified times. He was barred from entering the enlisted club or any other place where alcohol was served. He was also required to sleep in an assigned bed and to remain in the area during the night.[15] The court reiterated its position in *Williams* that the label placed on restraint was not dispositive,[16] and equated the conditions of Weisenmuller's "restriction" with arrest. The restraint, therefore, was sufficiently onerous to be considered tantamount to confinement and resulted in dismissal of the case under UCMJ art. 33.[17]

In another speedy trial case, *United States v. Schilf,*[18] the issue again was whether certain restriction time should be considered as confinement for *Burton* purposes. The Court of Military Appeals, in deciding how to allocate delay time, agreed with the Air Force court of Military Review that fifty-seven days of the "restriction" was equivalent to confinement. The court's decision relied heavily on the fact that Schilf had been restricted to the "narrow confines of his squadron area" and that the terms of the restriction included "an hourly sign-in procedure.[19] *Schilf* is significant because it became the principal case relied upon by military appellate courts in determining whether restriction was tantamount to confinement for speedy trial purposes.[20]

In *United States v. Mason,* the Court of Military Appeals applied the principles it had developed in cases involving speedy trial restriction issues to a credit for restriction issue. The accused in *Mason* had been ordered to remain within the unit dayroom, did not perform military duties, and was subject to a sign-in procedure.[21] Mason first asserted that the conditions of his restraint were equivalent to arrest. He argued that as arrest was equivalent to confinement for speedy trial purposes, it should be treated similar to pretrial confinement for credit purposes. In granting the requested credit, the court stated that "the principle set out in *United States v. Schilf* is applicable in determining the amount of credit to be given for pretrial confinement."[22] The court's decision in *Mason* suggests that *Schilf's* two-prong test, restriction to narrow confines and effective means to enforce the restriction, *e.g.,* an hourly sign-in procedure, should be applied when determining when administrative credit should be granted for pretrial restriction.

A New Analysis

The first post-*Mason* decision by the Army Court of Military Review, *United States v. Smith,* did not adopt the simple analysis suggested in *Mason* to resolve a credit for restriction issue. Smith, following a period of pretrial confinement, was restricted to his barracks building for fifty-six days.[23] The terms of restriction prohibited him from using the telephone without the permission of and in the presence of designated individuals; contacting his daughter or requesting that others contact his daughter for any purpose; performing normal duties; leaving the building without express authorization and an escort; having visitors, except between 1800 and 2000 on duty days and 1400–1800 on non-duty days (in the first sergeant's office in the presence of the charge-of-quarters); and discussing the charges against him with visitors. Further, he was required to perform duties assigned by the company commander and first sergeant, sign in with the charge-of-quarters every thirty minutes between 1700 and 2200 on duty days and between 0800 and 2200 on non-duty days, remain in his barracks room and leave the door unlocked while in his room.[24]

The Army court, after an extensive survey of the case law, opined that there was no bright-line test.[25] The court stated that only when the particular restriction so impaired a soldier's basic rights and privileges that the level of restraint approached confinement, on a "restriction to confinement" spectrum, should credit be given.[26] The court listed several factors relevant to characterizing restraint as confinement:

—nature of restraint (physical or moral);
—area of scope of restraint;
—types of duties, if any, performed; and,

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[14] 17 C.M.A. 636, 38 C.M.R. 434 (1968).

[15] *Id.* at 637, 38 C.M.R. at 435.

[16] *Williams,* 16 C.M.A. at 364, 37 C.M.R. at 212.

[17] *Weisenmuller,* 17 C.M.A. at 640, 38 C.M.R. at 438.

[18] 1 M.J. 251 (C.M.A. 1976).

[19] *Id.* at 252 n.2.

[20] *See e.g.,* United States v. Walls, 9 M.J. 88 (C.M.A. 1980) (withdrawing pass privileges did not activate *Burton*); United States v. Nash, 5 M.J. 37 (C.M.A. 1978) (restriction to guard shack was determined to be tantamount to confinement); United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (nature of restriction, *i.e.* revoking pass privileges, had substantive effect of restriction for speedy trial purposes).

[21] The underlying facts in *Mason* were not set out in the opinion. The facts were developed at trial. Record at 209–21, United States v. Mason, GCM 445153 (U.S. Army Berlin, 19 September 1983).

[22] 19 M.J. at 274 (citation omitted).

[23] 20 M.J. at 529–30.

[24] *Id.* at 530.

[25] *Id.* The cases discussed by the court all dealt with speedy trial analysis.

[26] *Id.* at 531.

—degree of privacy enjoyed within the area of restraint.[27]

The court further set out conditions which might significantly affect these factors.[28] The court, using its factual analysis and the "restriction to confinement" spectrum, held that Smith's restriction was tantamount to confinement and granted the requested credit.[29]

In a case following *Smith*, *United States v. Wiggins*,[30] appellate defense counsel argued that *Smith's* "spectrum analysis" was contrary to *Mason*, and that *Schilf* was the applicable standard. In his petition to the Army Court of Miliary Review, Wiggins sought credit for a thirteen day period of pretrial restriction.[31] Wiggins had been restricted to the first floor of his barracks and was permitted to leave the barracks only with permission and when accompanied by an escort. He was not permitted to make or receive phone calls and could only see visitors in the dayroom. He was required to sign in every two hours during the duty day and every hour during evenings. On weekends, Wiggins was required to sign in every four hours. Additionally, Wiggins was not required to perform military duties or attend formations.[32] The Army Court of Military Review, citing both *Mason* and *Smith*, held that the conditions of his restriction were not tantamount to confinement.[33] A close analysis of the facts, however, discloses that the only significant difference between *Wiggins* and *Smith* was that Smith had to sign in every thirty minutes, whereas Wiggins was required to sign in every two hours.

Many post-*Smith* requests for credit for restriction have been denied at the appellate level.[34] In a few cases, however, the Army Court of Military Review has granted relief, including the disapproval of forfeitures, when the adjudged sentence to confinement had been served.[35] For example, in *United States v. McKinney*,[36] the court granted McKinney credit for a two-week period of time he spent under pretrial restriction. During this period, McKinney was restricted to the company area and mess hall and was placed under twenty-four hour guard, including accompaniment by an escort to the shower and latrine. He was not allowed to perform his usual military duties or attend physical training sessions. He was, however, ordered to participate in clean-up details around the billets. At night, McKinney was confined to a room not his own.[37]

The court in *United States v. Lynn*[38] similarly granted credit for pretrial restriction. Lynn was placed under twenty-four hour guard and was not permitted to sleep in his own barracks room, but had to sleep on a cot in the company commander's office with a guard in the same room. The performance of normal military duties was prohibited, and Lynn was required to follow an escort wherever the escort went. Sign in with the charge-of-quarters was required every hour between 0600 and 2300 during weekdays and between 1200 and 2300 on weekends.[39]

In *United States v. Murphy*,[40] the accused argued at trial that he should receive credit for fourteen days of pretrial restriction which he claimed were tantamount to confinement. He was restricted to the confines of his room for the first two weeks of the "restriction" period. The severity of the "restriction" was disclosed by the questioning of the military judge at trial: the appellant was deprived of the use of a chair in his room, his personal property was taken (books and cigarettes), and he was refused permission to smoke. He was not allowed to perform military training with his unit, but was ordered to perform some detail work. Nevertheless, the military judge denied the requested credit.[41] On appeal, the Army Court of Military Review agreed with Murphy's contention that his restriction was tantamount to confinement.[42] By the time his appeal was filed, however, Murphy had already been released from confinement. To ensure that Murphy was given meaningful relief, the Court modified his sentence and returned some of the approved forfeitures.[43]

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[27] *Id.*

[28] *Id.* at 531–32. The factors included the presence of a sign-in procedure or an escort, whether the accused was permitted visitors or to make phone calls, and what facilities were available to the accused.

[29] *Id.* at 533.

[30] 20 M.J. 823 (A.C.M.R.) *petition denied*, 20 M.J. 196 (C.M.A. 1985).

[31] *Id.* Wiggins was before the court pursuant to a petition for extraordinary relief in the nature of a writ of mandamus. Wiggins petitioned the court because if relief was granted, he would be immediately eligible for release. Notably, by the time Wiggins could file the petition, he had already been released from confinement. Thus, the issue was effectively moot. *But see* United States v. Murphy, SPCM 20883 (A.C.M.R. 15 July 1985) *infra* note 40.

[32] *Id.* at 824.

[33] *Id.*

[34] *See e.g.*, United States v. Gahafer, CM 446774 (A.C.M.R. 29 August 1985); Guzman v. Greenwald, Misc. Docket No. 1985/11 (A.C.M.R. 28 June 1985); Washington v. Greenwald, 20 M.J. 699 (A.C.M.R.), *petition denied*, USCMA Misc. Dict. 85–19 (1985).

[35] *See infra* notes 36, 38, and 40.

[36] CM 446780 (A.C.M.R. 6 May 1985).

[37] Defense Appellate Exhibit A, Allied Papers, United States v. McKinney, CM 446780 (2d Armored Division (Forward) 13 Dec. 1984). The credit issue was not litigated at trial. The facts surrounding McKinney's pretrial restriction were presented to the court by way of affidavit.

[38] CM 446790 (A.C.M.R. 15 July 1985).

[39] Defense Appellate Exhibit A, Allied Papers, United States v. Lynn, CM 446790 (172d Infantry Brigade (Alaska) 31 Oct. 1984). The issue was not litigated at trial. Thus, Lynn was also required to describe the conditions of hs pretrial restraint by way of affidavit.

[40] SPCM 20883 (A.C.M.R. 15 Mar. 1985).

[41] Record at 52–63, United States v. Murphy, GCM 445153 (United States Army Armor Center and Fort Knox, 16 Aug. 1984).

[42] Slip op. at 1.

[43] *Id.*

In the most recent case discussing the issue of credit for pretrial restriction, *United States v. Huelskamp*,[44] the Army Court of Military Review relied on the totality of circumstances test of *Smith* to deny the requested credit. The court pointed out that although Huelskamp was confined to his company area and was required to sign in with the charge-of-quarters, the restriction was not strictly enforced. Moreover, during the period of restriction, Huelskamp was permitted to attend movies and sporting events and was allowed to maintain the company softball field without supervision.[45] The court noted that although Huelskamp was relieved from his normal duties and required to perform manual (fatigue) work around the company area, this same type of work was performed by other members of his unit. Finally, the court found that Huelskamp's right of privacy was not substantially impaired when compared with the restraint on privacy normally existing in pretrial confinement.[46]

Litigating the Issue

An accused's best opportunity to receive credit is at the trial, not the appellate level.[47] The *Smith* court specifically noted that appellate courts are ill-equipped to gather facts relevant to the issue.[48] In future cases, the failure to litigate this factual issue at trial could result in the application of the waiver doctrine at the appellate level.[49] Moreover, this issue is often mooted by the passage of time before it can be resolved on appeal. Defense counsel should question each client to determine if there has been any form of restraint pending trial. If counsel discovers that a severe form of restraint has been placed upon the client, he or she should take steps to litigate the issue of administrative credit.[50]

An appropriate factual basis for asserting the credit for restriction request must be developed. Counsel should elicit testimony from the accused and other witnesses to establish not only the basic terms of the restriction, but also the impact of the restraint on the accused's liberty, privacy, and freedom of association. As the facts pertaining to the terms and conditions of the restraint should not be in dispute in most cases, counsel may be able to develop sufficient facts to support the credit motion through stipulation. Finally, any documents relating to the restraint, such as a letter of restriction, should be introduced at trial.

The argument for administrative credit may be made in two parts. First, counsel should argue that the *Mason* decision mandates applying *Schilf's* simple two-prong test.[51] Because the Court of Military Appeals' goal in *Allen* was to provide parity with the federal system, *Schilf's* test is the proper one. The federal rule is that prisoners are given credit for "custody,"[52] a clearly less onerous restraint than confinement. Defense counsel should argue that an accused who is restricted to his or her company area with a means of insuring that he or she is in the immediate control of another, *e.g.*, periodic sign-in, should receive credit.

Counsel should also argue that the facts of the particular restriction are sufficiently onerous to fall on the confinement end of the "restriction to confinement" spectrum. Because *Smith* has been treated as controlling precedent, the facts should be marshalled and argued in light of *Smith's* "relevant factors." A review of *Smith* and its progeny indicates that certain conditions of restriction will be most persuasive: restriction to a limited area with a method of enforcing control; preclusion from participating in *normal*[53] military duties; and, finally, any other evidence which demonstrates serious infringement of privacy, such as a twenty-four hour guard.

Even if the military judge denies the request for administrative credit, the defense counsel should request an instruction advising the court members to consider the nature of the pretrial restraint imposed on the accused. Indeed, the Manual for Courts-Martial specifically mandates a sentencing instruction to court members concerning the nature and duration of pretrial restraint.[54] Even if credit is granted, the defense counsel should consider requesting an instruction pointing out that the accused's restriction is a factor in their sentence deliberations. Administrative credit based on *Mason* and *Allen* is a separate issue from the consideration by the panel of the effect of pretrial restriction on extenuation and mitigation. Finally, comments on the nature and effect of prior restriction would be appropriate during closing arguments on sentence.

Conclusion

The *Mason* court recognized that an accused should be granted credit for pretrial restriction when that restriction is equivalent to confinement. Until the Court of Military Appeals grants a petition for review to resolve the conflict

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[44] CM 446652 (A.C.M.R. 30 Sept. 1985). The court, however, granted administrative credit for the fifteen days Huelskamp was confined in a civilian jail under the direction of military authorities pending his return to his unit. This case is significant in that it established that the military accused is entitled to the *Allen* administrative credit for civilian confinement served to facilitate the needs of the military.

[45] *Id.*, slip op. at 2.

[46] *Id.*, slip op. at 2–3 n.3.

[47] Failure to litigate the issue may also give rise to a claim of ineffective assistance of counsel. *See* United States v. Carrico, CM 446217 (A.C.M.R. 26 July 1985) (ineffective assistance of counsel raised as error by appellate defense counsel, but this claim was not addressed by the court). *See also supra* note 4.

[48] 20 M.J. at 533.

[49] *See supra* note 4.

[50] Counsel should litigate this issue at a pretrial article 39(a) session UCMJ art. 39(a).

[51] *Supra* 28.

[52] 18 U.S.C. § 3568 (1982).

[53] Being placed on "details" by either a company commander or first sergeant should not weigh against credit.

[54] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial (R.C.M.) 1005(e)(4). Counsel should note that failure to request this instruction may result in waiver. R.C.M. 1005(f). *See also* United States v. Stark, 19 M.J. 519 (A.C.M.R. 1984).

between *Mason and Smith*, the Army Court of Military Review will continue to apply *Smith's* "spectrum analysis." Regardless of which standard applies, trial defense counsel should routinely determine whether or not the client was subject to a form of pretrial restraint. If some form of pretrial restraint was imposed, counsel should investigate and prepare to litigate this very fact-intensive issue. The defense counsel who fails to pursue this issue at the trial level may well deprive his or her client of meaningful relief.

Contract Law Note

Contract Law Division, TJAGSA

The Nonappropriated Fund System: Contracting Made Easy

Contracting using nonappropriated funds (NAFs) has always been an area where contract legal advisors have felt uneasy. This has been the case in part because, while the system is generally more flexible than the appropriated fund system, there has been confusion surrounding the regulations (or lack thereof) in this area. Much has been done in the last eighteen months to clarify and simplify the NAF contracting system. This article will review key changes that have occurred in NAF contracting.

The streamlining of the NAF contracting system began with the publication of the first Morale, Welfare, and Recreation UPDATE in February, 1984.[1] This first update renumbered the regulations and pamphlets, putting them all in the 215 publication series, and consolidated all guidance in the NAF arena into a single publication. Another immediate benefit of the update was the inclusion of the "R" forms—locally reproducible copies of all forms needed in NAF contracting. Efforts have been made to correct past inconsistencies and to simplify NAF contracting procedures in subsequent updates.[2]

A major development in early 1985 allowed for dramatic changes in the NAF system. The U.S. Army Community and Family Support Center (USACFSC)—a field operating agency of the Office of the Deputy Chief of Staff for Personnel—was created and given responsibility for NAF policy, including contracting policy. Previously there were different agencies or offices responsible for the various NAF regulations and pamphlets.[3] Consolidation of responsibility in a single agency has facilitated elimination of many of the inconsistencies between the various publications.

NAF contracting policy is contained in chapter 21 of AR 215–1,[4] which makes it clear that the key policy is to allow maximum flexibility at the local level. For example, competitive negotiation is preferred over sealed bidding, a much more rigid and time consuming procedure.[5] This philosophy of flexibility is also reflected in many of the changes made in the last eighteen months.

One change that served to simplify the system was the elimination of the two-tiered appeals process for disputes contained in the small purchases pamphlet, DA Pam 215–4. Prior to November 1984, contractors could challenge final decisions relating to supply and service contract disputes with The Adjutant General before appealing to the Armed Services Board of Contract Appeals (ASBCA).[6] This additional appeal opportunity was not available in construction contracts or in contracts which exceeded the small purchase limitations. MWR UPDATE Issue 4, 20 November 1984, eliminated this extra review step and all final decisions relating to NAF contracts are now appealed directly to the ASBCA.[7]

Another change that has served to simplify NAF contracting and also increase local command flexibility is the change in small purchase dollar limitations for NAF contracting officers. Through a series of changes, NAF contracting officers who are appointed by installation commanders[8] may be given warrants up to $25,000 for any category of contract.[9] This is equivalent to the appropriated fund small purchase limitation and a significant change from the old rules which set limitations ranging from $2,000 for construction contracts to $25,000 for resale and consumable items.[10] Appropriated fund contracting officers are still required to serve as contracting officers for all acquisitions over $25,000 and to review all amusement (*i.e.*, carnival) contracts prior to award.[11]

Changes also have been made in the competition requirements. Purchases under $1,000 need not be completed as

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[1] Morale, Welfare, and Recreation UPDATE [hereinafter cited as MWR UPDATE] Number 1, 20 February 1984. Included in this volume are Dep't of Army, Reg. No. 215–1, Administration of MWR Activities and Nonappropriated Fund Instrumentalities (NAFIs); Dep't of Army, Reg. No. 215–2, The Management and Operation of Army MWR Programs and NAFIs; Dep't of Army, Reg. No. 215–3, NAF and Related Activities Personnel Policies and Procedures; Dep't of Army, Pam. No. 215–4, NAF Small Purchases; and Dep't of Army, Reg. No. 215–5, NAF Accounting Policy and Reporting Procedures (hereinafter cited as AR 215–1, AR 215–2, AR 215–3, DA Pam 215–4, and AR 215–5, respectively).

[2] The MWR UPDATE has been published quarterly since February 1984. The current issue is Number 7, dated 26 August 1985. Issue Number 8 is expected in late November 1985.

[3] Responsibility for the publications included in the MWR UPDATE was shared by The Adjutant General's Office (AR 215–1, AR 215–2, and DA Pam 215–4), Office of the Deputy Chief of Staff for Personnel (AR 215–3), and Office of the Comptroller of the Army (Finance and Accounting) (AR 215–5).

[4] Policies set forth in AR 215–1 are not applicable to the Army and Air Force Exchange Service. AR 215–1, para. 21–2.

[5] AR 215–1, para. 21–3*a*. Sealed bidding is required only for construction contracts over $25,000. AR 215–1, para. 21–3*c*(8).

[6] ASBCA jurisdiction is based on the required contract clause rather than statute. *See* COVCO Hawaii Corp., ASBCA No. 26901, 83–2 B.C.A. (CCH) ¶ 16,554.

[7] AR 215–1, para. 21–5.

[8] NAF contracting officers are appointed in writing by installation commanders. DA Pam 215–4, para. 1–3. A sample warrant is contained in DA Pam 215–4, figure 1–1.

[9] DA Pam 215–4, para. 1–4*d*. Approval authority has been similarly changed. *See* AR 215–1, para. 21–3*e*, *f*.

[10] *Cf.* MWR UPDATE Issue 1, AR 215–1, paras. 21–3*e*(1), (2) and DA Pam 215–4, paras. 1–4, 1–9.

[11] AR 215–1, para. 21–3*d*(5).

long as the price is fair and reasonable.[12] Also, the threshold for written solicitations has been raised from $5,000 to $10,000.[13] As in the past, award need not be made to the lowest bidder or offeror as long as the award is approved by the installation commander as being to the best advantage of the NAFI.[14]

This article has reviewed significant recent changes in the NAF contracting system which have served generally to simplify the system and increase local command authority over nonappropriated funds. With the UPDATE format, changes can and have been implemented quickly. It is likely that changes will continue as USACFSC further reviews existing procedures. This makes it imperative that all local contract advisors review each UPDATE issue as it is published to insure that changes are promptly implemented and to insure that local NAF contracting officers are aware of the requirements placed upon them by these changes.

[12] DA Pam 215–4, para. 1–9.

[13] DA Pam 215–4, para. 1–12.

[14] AR 215–1, para. 21–3c(11). A legal review is also required before the installation commander may approve such awards. *Id.*

Criminal Law Notes

Criminal Law Division, TJAGSA

Constructive possession in Drug Cases

Two recent cases have reaffirmed the standards required to support convictions for wrongful possession of drugs under the theory of constructive possession. The Court of Military Appeals in *United States v. Traveler,* [1] affirmed a conviction for wrongful possession of cocaine, marijuana, and drug paraphernalia even though the contraband items belonged to other persons and the accused never touched the items. [2] In *United States v. Adam,* [3] the Air Force Court of Military Review found insufficient evidence to sustain either a conviction for possession of marijuana residue or marijuana drug paraphernalia, where the accused was in nonexclusive possession of the house where the illegal items were found. [4] Although attaining different results, both cases applied the *constructive possession* standards established in *United States v. Wilson,* [5] and made it clear that a conviction for wrongful possession of drugs may be sustained even though two or more people are in nonexclusive control of the premise where the illegal drugs are found.

In *Traveler,* the accused shared a house with his wife, and was convicted of use of cocaine, and possession of cocaine found in a trash basket, marijuana found in an ash tray, and drug paraphernalia. [6] After pleading guilty to cocaine use, the defense based its theory of innocence of the possession charges on the fact that the accused never owned the contraband items, and never touched or physically controlled the items. [7] In rejecting this defense theory the court, relying on *Wilson,* made it clear that the theory of constructive possession is not based on ownership or actual physical control of illegal drugs. The theory of constructive possession requires the government to demonstrate that the accused was knowingly in a position or had the right to exercise dominion and control over an item, either directly, or through others. [8] Inasmuch as all of the drugs and contraband items were in plain view, and the accused admitted using cocaine from the trash basket, smelling marijuana smoke in his house, and using a water pipe to ingest cocaine, the *Traveler* court had little difficulty affirming the conviction based on the theory of constructive possession. [9]

Although an individual may not be convicted of possession of illegal drugs if he lacks knowledge that the drugs were present under his control, [10] certain inferences are useful in establishing knowledge and control. Where an individual is the sole occupant of the premises, it may logically be inferred that he knowingly has dominion and control over objects located on that premises. [11] In *Wilson,* the court observed that where one is in nonexclusive possession of premises, it cannot be inferred that he knows of the presence of drugs, or had control to them, unless there are other incriminating statements or circumstances. [12] The court in *Adam* focused on the sufficiency of evidence offered as other incriminating statements or circumstances. Sergeant Adam shared a house with her husband, their young child, and a male house guest. She was charged with use of methamphetamines, possession of twelve items of drug paraphernalia normally used with marijuana, and possession of a bundle of razor blades normally used to prepare methamphetamines. [13]

The court found that Sergeant Adam's possession of razor blades in the same proximity as the marijuana paraphernalia, and her use of methamphetamines, was sufficient only to support an inference that the accused possessed the methamphetamine drug paraphernalia (the razor blades). This evidence was insufficient to support an inference that the accused possessed the marijuana paraphernalia. [14]

The court in *Adam* listed factors which could buttress an inference that the accused knew of the presence of drugs or had control of drugs:

1) Statements made by the accused;
2) Suspicious behavior;
3) The sale of drugs;
4) The accused's use of drugs;
5) The proximity of the accused to the drugs; and
6) The proximity of the accused's personal belongings to the seized drugs. [15]

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[1] 20 M.J. 35 (C.M.A. 1985).

[2] *Id.* at 37.

[3] 20 M.J. 681 (A.F.C.M.R. 1985).

[4] *Id.* at 683. The court did find the accused guilty of wrongful use of methamphetamines and possession of paraphernalia used to prepare methamphetamines.

[5] 7 M.J. 290 (C.M.A. 1979).

[6] 20 M.J. at 37.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Manual for Courts-Martial, United States, 1984, Part IV, para. 37c(2).

[11] 7 M.J. at 293. *See also* United States v. Hobbs, 8 M.J. 71, 73 (C.M.A. 1979).

[12] 7 M.J. at 293.

[13] 20 M.J. at 681.

[14] *Id.* at 683.

[15] *Id.* at 683 n.3.

When confronted with a case where two or more soldiers were in nonexclusive control over an area where drugs were found, counsel must at a minimum consider these factors. Inferences sufficient to support a conviction for wrongful possession have been found where an accused had made incriminating statements;[16] acted in a suspicious manner;[17] was involved in drug use;[18] was involved in the sale of drugs;[19] and where the accused or his belongings were in close proximity to the seized illegal drugs.[20] Moreover, the Court of Military Appeals has found that where an accused controlled an automobile, it could be concluded that the accused exercises dominion and control over illegal drugs concealed in that automobile.[21]

While mere presence of an accused on the premises where drugs are found, or mere association with another are insufficient to establish constructive possession,[22] nonexclusive control over the premises should not be considered fatal to the government's case. Where two or more persons share an area where drugs are found, either or both may be convicted of wrongful possession if it can be established that either or both was knowingly in a position to, or had the right to, exercise dominion and control over the drugs.[23] Although a conviction will fail if the accused did not know the substance was under his control, awareness may be inferred from other incriminating statements and circumstantial evidence.[24] Trial and defense counsel must fully explore those factors which could buttress an inference that the accused had knowledge of the presence of drugs or had control of them.

Unlawful Command Influence

In *United States v. Cruz,*[25] the Army Court of Military Review, sitting *en banc,* set forth a methodology for reviewing unlawful command influence issues. The division artillery (DIVARTY) commander in *Cruz* had been notified of large-scale drug abuse and drug distribution problems within the unit.[26] The commander decided to conduct a mass apprehension at a post-wide formation attended by approximately 1200 soldiers. The DIVARTY commander addressed the formation and stated that some of the soldiers present did not meet Army standards and should be removed from their units. The court assumed the truth of allegations that the commander referred to such soldiers as "criminals" and "bastards"[27] during this speech. Then the commander read the names of forty individuals and directed them to report to the front of the formation. Some had unit crests removed, and then, within view of the other soldiers, they were searched, handcuffed, and then transported to the Criminal Investigation Division office for questioning and further processing.

Thirty-five of the forty soldiers apprehended were from the same battalion. The battalion commander arranged for these soldiers to live in an open-bay area on the top floor of the battalion headquarters pending preferral of charges. These soldiers became known as the "Peyote Platoon" and the court accepted as true the allegation that they were forced to march to the cadence "peyote, peyote."

The disposition of these cases, involving charges of wrongful distribution and use of hashish, ranged from general courts-martial to Article 15 punishment. Only one officer and one noncommissioned officer stated that they understood from the above events that they were directed not to testify or to dispose of cases in a certain manner. Neither played a role in Sergeant Cruz's case, however. Also, in a majority of the other cases in which punitive discharges were adjudged, commissioned officers or noncommissioned officers testified for the accused. No such testimony was presented in *Cruz,* but there was evidence that Cruz was a marginal soldier.

The Army court's thesis was that unlawful command influence must be considered from two distinct points of view. The first issue was whether the accused was prejudiced by actual unlawful command influence. The second issue was whether there was an appearance of unlawful command influence to a substantial segment of reasonable members of the public.

In examining the issue of actual unlawful command influence at the appellate level, the court stated that general courts-martial and BCD special courts-martial were entitled to the same rebuttable presumption of regularity as civilian courts of record. Thus, the accused must not only produce sufficient evidence to shift the burden of persuasion to the government, but there must also be some specific

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[16] United States v. Garcia, 655 F. 2d. 59 (5th Cir. 1981); United States v. Traveler, 20 M.J. 35, 37 (C.M.A. 1977). *But see* United States v. Bruce, 14 M.J. 254 (C.M.A. 1982); United States v. Burns, 4 M.J. 572 (A.C.M.R. 1977) (statements by accused to another to hold some marijuana for him were insufficient).

[17] United States v. Hobbs, 8 M.J. 71 (C.M.A. 1979); United States v. Cooper, 14 M.J. 758 (A.C.M.R. 1982).

[18] United States v. Traveler, 20 M.J. 35 (C.M.A. 1985); United States v. Adam, 20 M.J. 681 (A.F.C.M.R. 1985); United States v. Robinson, 14 M.J. 903, 906 (N.M.C.M.R. 1982).

[19] United States v. Garcia, 655 F.2d 59 (5th Cir. 1981). *But see* United States v. McMurry, 6 M.J. 348 (C.M.A. 1979) (accused's offer to sell heroin held insufficient to sustain a conviction for wrongful possession of cocaine).

[20] United States v. Hobbs, 8 M.J. 71 (C.M.A. 1979). In *Wilson,* 7 M.J. at 292, 294, the court focused on the lack of the accused's belongings in the apartment where the drugs were located as a reason for reversing his conviction.

[21] United States v. Griffin, 8 M.J. 66 (C.M.A. 1979).

[22] *Wilson* 7 M.J. at 294.

[23] *Adam,* 20 M.J. at 38.

[24] *Wilson,* 7 M.J. at 293.

[25] 20 M.J. 873 (A.C.M.R. 1985) (en banc).

[26] The DIVARTY commander was also an installation commander in Germany and a special court-martial convening authority. The commander did not refer the case to trial.

[27] 20 M.J. at 876.

prejudice to the accused to merit relief. Generalized unsupported claims of unlawful command control will not suffice to shift the burden.

Cruz asserted only that it was possible that his chain of command was deprived of discretion or that he was deprived of favorable testimony. The court concluded that mere possibilities were insufficient to shift the burden of persuasion to the government.[28] Had the accused shown that a person with particular knowledge relevant to the case reasonably understood that the commander told him not to testify, however, such evidence would trigger a presumption that the witness complied with the commander's order. This fact, coupled with a showing that such evidence was relevant and its absence caused substantial harm, would be enough to shift the burden to the government. The government would then have to produce clear and positive evidence that the appellant was not deprived of such evidence or that no specific prejudice resulted.

The court rejected the claim that requiring additional evidence from the appellant was unrealistic as unlawful command influence was normally done in secret. The court recognized that while this was a legitimate concern, the answer was not to "overreact" and make the government prove the absence of unlawful command influence or to relieve the appellant of his burden.

Next, the court stated that even if no actual unlawful command influence existed, the inquiry was not completed. The appearance of unlawful command influence issue must also be examined. Here the interests of the military justice system are endangered, so the remedy must be tailored to restore public confidence in the military justice system rather than relating to the appellant's interests. The court stated that the most effective remedies center on appellate review, using the appellate court's reputation for competence and fairness, and laying out the facts in the court's opinion as a matter of public record "to satisfy the public that justice was done by the trial court."[29] Reversal was characterized as an "unmerited windfall to the appellant who has not suffered actual prejudice, although it may be required as a last resort when no other feasible course of action will restore public confidence."[30]

The court examined the facts in *Cruz* and asked what reasonable members of the public would conclude. Relying on the varied disposition of cases and the testimony provided for other accused, the court concluded there was no appearance of unlawful command influence. No relief was granted as to the unlawful command influence issue in *Cruz*.

Judge Naughton dissented and criticized the majority's clear distinction between actual unlawful command influence and the appearance of unlawful command influence issue. He would have returned the case for a *DuBay*[31] hearing to resolve the issue of unlawful command influence.[32] Judge Pauley provided the only other dissent. He was satisfied the facts constituted a "flagrant" case of unlawful command influence sufficient to justify a finding of prejudice and reversal.[33]

The thesis set out by the court was derived from earlier Court of Military Appeals cases.[34] The Army Court of Military Review synthesized those opinions and provided a methodology to apply in resolving incidents of unlawful command influence. *Cruz* will have its greatest impact on cases involving allegations of improper influence on potential witnesses.[35] In those cases there is a "gap" between any presumption of unlawful command influence and a finding of prejudice in an appellant's case. *Cruz* now forces the defense counsel to fill the gap in such cases and show how the witnesses would have affected the trial.

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[28] *Id.* at 886. The court rejected the claim that an appellate finding of unlawful command influence required reversal without specific prejudice to the accused. This precise issue is awaiting decision by the United States Court of Military Appeals in several cases, notably United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984), *petition granted*, 19 M.J. 281 (C.M.A. 1985).

[29] 20 M.J. at 889.

[30] *Id.* at 890.

[31] 17 C.M.A. 147, 37 C.M.R. 411 (1967).

[32] 20 M.J. at 894.

[33] *Id.* at 897. The majority opinion also held that removal of the unit crests and the facts relating to the "Peyote Platoon" did not constitute cruel and unusual punishment. *Id.* at 893.

[34] United States v. Grady, 15 M.J. 275 (C.M.A. 1983); United States v. Rosser, 6 M.J. 267 (C.M.A. 1979); United States v. Johnson, 14 C.M.A. 548, 34 C.M.R, 328 (1964); United States v. Fowle, 7, C.M.A. 349, 22 C.M.R. 139 (1956); United States v. Navarre, 5 C.M.A. 32, 17 C.M.R. 32 (1954).

[35] The court recognized that "the presumption that recipients of unlawful command influence succumbed and complied will, as a practical matter, have the same effect as a presumption of specific prejudice." (Examples are court members and actual witnesses in cases.) 20 M.J. at 888.

International Law Note

International Law Division, TJAGSA

Opinion of The Judge Advocate General

(Terrorism; Weapons-Ammunition) **Use of Expanding Ammunition by U.S. Military Forces in Counterterrorist Incidents.** DAJA-IA 1985/7026, 23 September 1985.

In the following memorandum for the Director, Operations, Readiness, and Mobilization (DAMO-OD), The Judge Advocate General addressed the use of expanding ammunition by U.S. military forces in counterterrorist situations. Typical examples of this type of ammunition include so-called dum-dum bullets, hollow-point bullets, and soft-point bullets.

1. *Summary.* This memorandum addresses the legality of use of expanding ammunition by U.S. military forces in counterterrorist incidents. It concludes that the use of such ammunition by designated U.S. military forces in counterterrorist incidents does not violate the international legal obligations of the United States.

2. *Background.* In 1899 the nations attending the First Hague Peace Conference adopted a Declaration Concerning Expanding Bullets that provides as follows:

> The contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.
>
> The present declaration is only binding for the contracting powers in the case of a war between two or more of them.

Although the United States did not become a party to this treaty, as a matter of policy it has acknowledged and respected its applicability in conventional combat operations in the wars in which United States forces have participated since the declaration was adopted. The United States is a party to the Hague Convention IV of 1907. Article 23(e) of its Annex prohibits the employment of "arms, projectiles, or materiel calculated to cause unnecessary suffering." The issue in this memorandum is the applicability (or non-applicability) of these law of war treaty provisions to counterterrorist incidents.

3. *Conventional Combat.* A review of the records of the First (1899) and Second (1907) Hague Peace Conferences provides clear indication that the nations represented contemplated the application of the referenced provisions only as protection for lawful combatants in conventional armed conflicts between nations. Each of the above-cited treaties was drafted with a view to conventional combat operations as generally fought then and now: combat between lawful combatants on a battlefield relatively devoid of civilians, utilizing a high volume of firepower. The individual soldier did not (and does not) rely solely upon his personal weapon to defeat the enemy, but on the massed fire of a number of individual and crew-served weapons supported by landmines, hand grenades, and artillery. Weapons and ammunition were (and remain) designed for incapacitation rather than lethality. The 1899 Hague Declaration Concerning Expanding Bullets was agreed upon because its purported humanitarian effects coincided with contemporary military small arms design (requiring a jacketed bullet for proper feeding in rapid fire weapons) and doctrinal requirements (which recognized that wounding enemy soldiers increased the logistic burden upon the enemy). Civilians who did find themselves on the battlefield were protected from intentional attack so long as they did not take part in the conflict. The act of combatants killing or wounding enemy combatants in war is a legitimate act under international law for which the individual soldier bears no criminal responsibility.

4. *Terrorism.* Unlike conventional combat operations in which force is applied by lawful combatants against enemy military personnel and equipment, acts by terrorists generally are directed against civilian or civilian objects. They involve unlawful acts such as the hijacking of civil aircraft; the taking of hostages; and/or the murder of innocent civilians. They could involve the seizure of civilian facilities such as a nuclear power plant; the theft of a nuclear weapon; or the seizure of a nuclear weapons facility or vehicle, aircraft, or vessel containing a nuclear weapon or other potentially dangerous material. Such incidents frequently take place in the midst of populated areas or in close quarters where the lives of innocent civilians would be at risk.

Terrorists are not regarded as lawful combatants, but as criminals, and are not entitled to the protection of law of war treaties. Most do not represent a nation or its armed forces. In state-sponsored terrorism, the degree of support or direction of the sponsoring state is neither clear nor admitted by that nation. If captured, terrorists are not entitled to prisoner of war status and are criminally liable for their acts.

Counterterrorist missions such as the 1976 Israeli mission to Entebbe, the 1977 West German mission to Mogadishu, or the 1980 U.S. mission to Iran are regarded as humanitarian rescue missions short of war. Neither the state whose sovereignty is breached by such a rescue mission, the nation dispatching the rescue force, nor the states represented by the hostages or victims of the terrorist act are likely to recognize the existence of a state of war. However, as it would be the position of the United States government that members of the armed forces of the United States engaged in such humanitarian rescue or counterterrorist missions remain entitled to combatant status and treatment as prisoners of war if captured by host country forces even though they may possess or have used such ammunition, it is imperative that U.S. military counterterrorist forces otherwise execute the assigned mission in accordance with the international law obligations of the United States.

Under these circumstances, neither the restriction contained in the 1899 Hague Declaration Concerning

Expanding Bullets nor the provision protecting lawful combatants from unnecessary suffering expressed in article 23(e) of Hague Convention IV of 1907 is deemed applicable to counterterrorist situations not involving engagement of the armed forces of another State. There remains a question as to whether such restrictions should be recognized even if not applicable. For the following reasons, they are not:

a. Full-jacketed or standard military ball ammunition is intended for use in conventional combat, where aimed fire is integrated with automatic weapons and other systems for incapacitation. Counterterrorist operations depend upon high lethality on an extremely selective basis; speed and accuracy of the single shot, combined with adequacy of power to ensure the immediate disability of any terrorist posing a threat to the hostages, rescue force, or dangerous materials, are essential to the successful conclusion of a terrorist incident where force is required.

b. Ball ammunition has distinct disadvantages in counterterrorist operations. If it is powerful enough to disable (rather than merely incapacitate) a terrorist with a single shot, it is powerful enough to pass through the target and injure or kill innocent civilians or damage equipment (such as the pressurized cabin of an aircraft) that may place the hostages and members of the rescue force at risk. If its power is decreased in order to lessen the risk of collateral civilian casualties or avoid serious material damage, the round lacks sufficient power to insure the one-shot disabling effect required. The purpose for utilization of expanding ammunition in such very close life-threatening situations is to employ a projectile that deposits all of its energy in the target. This provides for high target selectivity by maximizing the disabling effect on the target while minimizing the aforementioned risk to hostages or dangerous material.

5. *Conclusion.* The law of war treaties discussed herein were not intended to apply to counterterrorist or hostage rescue situations. The possibility of "superfluous injury" to a terrorist is far outweighed by the humanitarian concerns for protection of the innocent civilians taken hostage or otherwise placed at risk, the members of the rescue force, or the civilian population in the surrounding area where there is a risk of release of dangerous materials. Therefore, use of expanding ammunition is legally permissible in counterterrorist operations not involving the engagement of the armed forces of another State. As use is scenario dependent, this issue should be addressed specifically in the planning process. Because of the legal obligations expressed herein and concomitant problems of ammunition control, expanding ammunition should be issued only to units directly involved on a full-time basis in counterterrorist operations, and not to military law enforcement authorities or local special reaction teams trained on a collateral basis for counterterrorism missions.

6. This memorandum has been coordinated with and is concurred in by the Office of the General Counsel, Department of Defense; the Legal Adviser and Legislative Assistant to the Chairman, Joint Chiefs of Staff; and the Offices of the Judge Advocates General of the Navy and Air Force.

Judiciary Notes

US Army Judiciary, USALSA

Digest-Article 69, UCMJ, Application

A recent application submitted under the provisions of UCMJ article 69(b), *Miltenberger,* SPCM 1985/5705, involved an accused who, after conviction for wrongful possession of marihuana, was sentenced by the military judge, sitting alone, to reduction in grade from E–7 to E–5, forfeiture of $250.00 pay per month for two months, restriction for 60 days, and extra-duties for 60 days. A review conducted by a judge advocate pursuant to Rule for Courts-Martial (R.C.M.) 1112 determined that the proceedings and the approved sentence were legally sufficient. According to R.C.M. 1003, extra-duty is no longer an authorized punishment in cases tried after 1 August 1984. Although this issue was not raised by the accused, The Judge Advocate General granted partial relief to the accused by way of sentence modification—setting aside the extra-duty portion and reducing the forfeiture to $250.00 pay for one month.

Checklist for Initial Promulgating Orders

A proposed checklist to assist those who compose or review initial court-martial promulgating orders was given to staff judge advocates attending the 1985 Worldwide JAG Conference. The checklist is intended to reduce uncertainty and errors when summarizing specifications and findings, particularly when amendments or exceptions and substitutions are involved. General court-martial jurisdictions are asked to submit any comments or suggestions concerning the checklist as soon as practicable to the Clerk of Court, U.S. Army Judiciary (ATTN: JALS–CCZ), Nassif Building, Falls Church, VA 22041–5013. Jurisdictions not represented at the Conference may obtain a copy of the draft checklist by writing to the Clerk or by telephoning Autovon 289–1888.

Processing Time: Post-Trial Defense Delay

In response to questions from the field concerning deduction of post-trial delays on the Record of Trial Chronology Sheet (DD Form 490), and while joint service revision of the Chronology Sheet is under study, the Statistical and Coding Branch of the Clerk of Court's office will deduct from overall processing times certain post-trial delays resulting from an express or implied defense request.

The only delays deducted will be *extensions* of time granted pursuant to R.C.M.s 1105(c), 1106(f), and 1110(f). Other delays, such as the time required for authentication of the record or time consumed in sending a record or recommendation to a distant defense counsel, may be noted in

the Chronology Sheet remarks section, if desired, but no deduction will be made. Those are systemic delays, not the result of an express or implied defense request.

The deductible defense delays should be shown as follows. In the remarks section, label each delay, such as:

Defense Delay, R.C.M. 1105(c): 5 days (6–10 Mar 85).

Defense Delay, R.C.M. 1106(f): 3 days (31 Mar–2 Apr 85).

Insert the sum of R.C.M. 1105 and 1106 extensions as a negative figure, −8 or (8) in the example above, in the Cumulative Elapsed Delays column between the last two entries and deduct that amount in computing the final entry.

Extensions under R.C.M. 1110(f) occur only after the convening authority's action. Accordingly, make an explanatory entry in the remarks section, as shown above, but enter the extension's number of days, as a negative figure below the end of the Cumulative Elapsed Days column where it can be seen and deducted when the number of days from action to dispatch of the record is calculated in the Clerk's office.

Questions should be directed to the Statistical and Coding Branch (JALS–CCC), Autovon 289–1790.

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Tax News

Tax Liability of Government Employees in the Republic of Panama

The June 1985 issue of *The Army Lawyer* contained information concerning cases which provided a basis for arguing that military and civilian employees of the Panama Canal Commission are exempt from federal income tax based on provisions of the Panama Canal Treaty of 1977. The cases which provided the basis for that position were under appeal at the time of the article. One of those cases was reversed by the U.S. Court of Appeals for the Federal Circuit. *United States v. Coplin*, 761 F.2d 688 (Fed. Cir. 1985). The court took judicial notice of statements of representatives of the Panamanian Foreign Ministry indicating that it was the understanding of the Panamanian Government that the provisions of the treaty were not intended to affect the authority of the United States to tax the income of employees of the Panama Canal Commission. Rather, the language of the treaty was intended only to preclude the Panamanian Government from taxing the income. Accordingly, the Court of Appeals for the Federal Circuit reversed the district court's judgment in favor of the taxpayers. This decision was reported in the September issue of *The Army Lawyer*.

A second case has now been decided with an opposite result. The Eleventh Circuit, in *Harris v. United States*, 768 F.2d 1240 (11th Cir. 1985), refused to take judicial notice of the statements of the Panamanian representatives. The court found that the clear language of Article XV(2) of the treaty creates a bi-national tax exemption for employees of the Panama Canal Commission. The Department of Justice (DOJ) has over 100 similar cases pending the outcome of this battle, and the IRS has asked DOJ to petition the Supreme Court for a writ of certiorari. In the interim, the guidance provided in the June 1985 issue of *The Army Lawyer* concerning preservation of claims remains appropriate.

ABA LAMP Committee's San Antonio Meeting

The American Bar Association's Standing Committee on Legal Assistance for Military Personnel (LAMP) met 11–14 September in San Antonio at a meeting hosted by the Office of the Staff Judge Advocate, Fort Sam Houston, Texas.

Included among committee activities were a general business meeting, a tour of Air Force basic training facilities at Lackland AFB, presentations on the legal assistance programs at Lackland, Fort Sam Houston, Fort Hood, and the Corpus Christi Naval Station, and a continuing legal education seminar which featured Texas family law and estate and financial planning.

Merger of ABA Military Committees

The committee discussed the proposed merger within the ABA of the three current committees specializing in military law into one larger committee. In addition to the LAMP Committee, there is the ABA Committee on Lawyers in the Armed Forces and the Military Law Committee of the General Practice Section. The committee agreed to generally oppose merger of the three committees into one because each committee serves specialized functions.

Checklist for New Personnel Entering the Military

The committee has completed work on a new checklist for personnel entering the armed forces. After a final review, the checklist will be distributed to the chiefs of legal assistance from all the uniformed services for dissemination to the field. Within the Army, distribution to new personnel will be through the U.S. Army Recruiting Command.

"Operation Standby"

A report was rendered on the status of "Operation Standby," which is a LAMP Committee initiative to provide a pool of civilian practitioners in individual states or localities who will answer questions on specialized areas of state law for military attorneys. Civilian attorneys who participate in "Operation Standby" do not provide representation for military clients, but serve only as a resource to answer questions posed by military attorneys. For example, a military attorney in Germany with a client who has a question concerning a particular aspect of North Carolina law may contact a participating North Carolina attorney to have the question answered. The contact persons for the states with "Operation Standby" programs are:

Connecticut

Richard C. Noren, Chairman
Connecticut Bar Association
Veterans and Military Affairs Committee
Box 191
Putnam, CT 06281

District of Columbia

Neil B. Kabatchnick, Chairman
Military Law Committee
Bar Association of District of Columbia
1050 17th Street, N.W.
Suite 460
Washington, D.C. 22036

Florida

John S. Morse, Esq.
Military Law Aid To Servicemen Committee
4600 W. Kennedy Boulevard
Tampa, Florida 33609

New Jersey

Sanford Rader, Chairman
State Military Law Committee, Operation Stand-By
Box 621
Perth Amboy, New Jersey 08862

North Carolina

Mark E. Sullivan, Director
Special Committee on Military Personnel
c/o Sullivan and Pearson, P.A.
1306 Hillsborough Street
Raleigh, North Carolina 27605

Virginia

Stephen Glassman, Chairman
Special Committee on Military Law
1101 Connecticut Ave., N.W.
Suite 409
Washington, D.C. 20036

Maryland

Wallace Dann, Chairman
Committee on Legal Assistance
For Military Personnel
Maryland State Bar Association
305 W. Cheasapeake Ave.
Cheasapeake Building, Suite 517
Towson, Maryland 21204

Washington

Mr. Frederick O. Frederickson
Graham and Dunne
34th Floor, Rainer Bank Tower
1301 5th Ave.
Seattle, Washington 98101

The committee is also considering contacting local bar associations in areas of large military concentrations to establish "Operation Standby" programs at the local level.

Military Law Committees in State Bar Associations

The committee briefly discussed efforts to encourage individual state bar associations which do not currently have military law committees to establish such committees. The following state bar associations have military committees:

Alabama

Alabama State Bar
Military Law Committee
C.V. Stelzenmuller, Chairman
1600 Bank for Savings Building
Birmingham, AL 35223

California

State Bar of California
Legal Services Section
Standing Committee on Military
Legal Assistance
William Dunbar, Chairman
2150 Valdez Street, #885
Oakland, CA 94612

San Diego

San Diego County Bar Association
Military Liaison Committee
Michael R. Pent, Chairman
4014 Tambor Road
San Diego, CA 92124

Connecticut

Connecticut Bar Association
Veterans' and Military Affairs
Committee
Hon. Richard C. Noren, Chairman
Box 191
Putnam, CT 06281

District of Columbia

The Bar Association of the
District of Columbia
Military Law Committee
Neil B. Kabatchnick, Chairman
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, DC 20036

Florida

The Florida Bar
Military Law Aid to Servicemen
Committee
John S. Morse, Chairman
4600 W. Kennedy Blvd.
Tampa, Florida 33609

Maryland

Maryland State Bar Association
Committee on Legal Assistance for
Military Personnel
Wallace Dann, Chairman
Suite 517, Chesapeake Bldg.
305 W. Chesapeake Avenue
Towson, MD 21204

Michigan

State Bar of Michigan
Committee on Military Law
Charles R. Rutherford, Chairman
3200 Penobscot Building
Detroit, Michigan 48226

Missouri

The Missouri Bar
Military Law Committee
James A Daugherty, Chairman
100 N. 12th Boulevard, Rm. 630
St. Louis, Missouri 63101

New Jersey

New Jersey State Bar Association
Military Law Committee
Sanford Rader, Chairman
Box 621
Perth Amboy, NJ 08862

New York

New York State Bar Association
Special Committee on Military and
Veterans Affairs
Prof. Joseph A. Calamari,
Chairman
St. John's Law School
Utopia & Grand Central Parkway
Jamaica, NY 11539

North Carolina

North Carolina State Bar
Special Committee on Military
Personnel
Mark E. Sullivan, Director
1306 Hillsborough St.
Raleigh, NC 27605

Georgia

State Bar of Georgia
Military Law Section
George J. Polatty, Sr., Chairman
P.O. Box 396
Roswell, Georgia 30075

Hawaii

Hawaii State Bar Association
Donal C. Machado, Chairman
Legal Assistance for Military
Committee
P.O. Box 26
Honolulu, HI 96810

Illinois, Chicago

Chicago Bar Association
Military Law and Affairs
Committee
Gerald Rubin, Chairman
Suite 111, Westmoreland Bldg.
Skokie, IL 60077

Iowa

Iowa State Bar Association
Military Affairs Committee
Peter A. Keller, Chairman
P.O. Box 250
Dallas Center, Iowa 50063

Kansas

Kansas Bar Association
Military Law Section
John Reals, Chairman
833 N. Waco
P.O. Box 1798
Wichita, Kansas 67201

Texas

State Bar of Texas
Military Law Section
Jay D. Hirsch, Chairman
917 Franklin
Houston, Texas

Utah

Professor Ronald N. Boyce,
Chairman
Military Law Committee
Utah State Bar
College of Law
University of Utah
Salt Lake City, UT 84112

Virginia

Virginia State Bar
Special Committee on Military
Law
Stephen Glassman, Chairman
1101 Connecticut Ave., N.W.
Suite 409
Washington, DC 20036

Washington

Washington State Bar Association
Legal Services to the Armed
Forces Committee
Thomas J. Kraft, Chairman
1012 Seattle Tower
Seattle, WA 98101

West Virginia

West Virginia Bar Association
Military Affairs Committee
Abraham Pinsky, Chairman
P.O. Box 349
Wellsburg, WV 26070

LAMP Newsletter

The Committee re-emphasized its desire to obtain more legal assistance articles from military and civilian practicioners for publication in its Legal Assistance Newsletter. Articles for the Newsletter should be submitted to: Kevin Flood, 464 Bay Ridge Ave., Brooklyn, New York 11220.

The committee is reviewing its distribution system to verify that each military legal assistance office receives five copies, with bulk mailings to The Judge Advocate General's School for basic and graduate course students.

Upcoming LAMP Meetings

The committee will next meet in December 1985 at Andrews Air Force Base in a meeting sponsored by the Air Force. The spring 1986 meeting is scheduled for San Francisco and will be sponsored by the Navy. The summer meeting is scheduled for 5-7 June 1986 at Eglin Air Force Base, Florida. The committee agreed to hold the September 1986 meeting in Norfolk, Virginia, with the Army as sponsor.

Revised Guidelines for Presentation of LAMP Committee Awards

The LAMP Committee has recently revised the guidelines and criteria to be used in selecting recipients for its

legal assistance awards. The revised guidelines are set forth below for your information.

Introduction

The committee will endeavor to utilize the group and/or individual certificate awards in such a manner as to further the quality and effectiveness of the legal assistance programs of the Armed Forces. The committee recognizes that the principal personal reward for effective provision of legal assistance is professional satisfaction. Nonetheless, the committee concludes that recognition of outstanding performance, in legal assistance as well as other more well known areas of military practice, is both motivational and career enhancing. The award presented by this committee would be a means by which command attention is focused on deserving group or individual efforts, and the awards will be utilized to that end.

I. Criteria for the Award

1. Equal consideration will be given to all active and reserve military as well as civilian groups and individuals serving in or employed by legal assistance offices of the Armed Forces of the United States.

2. No quota relating to the number of awards to any particular service shall be imposed, although the committee will endeavor to utilize the awards program for enhancement of legal assistance activities in all of the services. There may be no more than six awards made during any single American Bar Association year.

3. Awards shall be considered a singular achievement not necessarily merited merely by long service or normal competent performance. It shall not be necessary, in the absence of justification, for any award to be given in any particular year.

4. Group awards are limited to a single armed forces command element legal staff providing legal assistance services, such as staff judge advocate office, law center, *etc.* The element receiving such an award shall not be eligible for a repeat award for four years. The award, in the form of an appropriate certificate, shall be in recognition of:

(a) a superior, functioning legal assistance program worthy of emulation as judged by peers; or
(b) a major legal assistance innovation made by a group effort; or
(c) an outstanding group effort resulting in the maintenance of quality legal assistance services despite limited resources and support.

5. Individual awards are limited to individual attorneys or certified paralegals employed by an armed service, whether active duty, reserve or civilian. The recipient shall not be eligible for a repeat award for three years. The award, in the form of an appropriate certificate, shall be in recognition of:

(a) a major legal assistance innovation; or
(b) demonstrated superior individual effort dedicated to providing legal assistance services over a sustained period of time. As previously noted, however, normal competent performance over a long period of time shall not satisfy this criteria.

6. Posthumous awards are not within the scope of this award program.

II. Nominating Procedures

1. Any member of the Advisory Committee or the Standing Committee or the Judge Advocate General of any military service may initially nominate a group or individual for an award.

2. Nominations are required to be in writing and shall include both sample documents and rationale in support thereof.

3. In the event that the nomination is made by someone other than the Judge Advocate General or the Advisory Committee member of the proposed recipient's service, the nomination will be referred to the cognizant Advisory Committee member for such internal service coordination as that Advisory Committee member might deem appropriate.

4. Comments from the Advisory Committee member from the service concerned are required to be in writing and should cover the following points:

(a) whether the award to the group/individual is deemed to be merited;
(b) whether the group/individual award meets the criteria established and will further the purposes for which such awards are given; and
(c) the most desirable logistics in regard to presentation of the award, if approved.

5. If the nomination for a group/individual award fails to obtain the approval of the Committee, a nomination for the same group or individual may not be considered within a period of six months from the time the nomination was made.

III. Committee Voting Procedures

1. Awards may be authorized by vote of at least six of the Committee members during a regularly scheduled meeting or by mail or a combination thereof.

2. No award authorization may be made unless a written nomination and an Advisory Committee member's or Judge Advocate General's written comments have been made available to the Committee prior to a vote being taken by mail or during a meeting.

3. An award, once authorized, will be in the form of a certificate which the Chairman of the Committee is authorized to sign on behalf of the Committee.

4. If the nomination for a group/individual award fails to obtain the approval of the Committee, a nomination for the same group or individual may not be considered within a period of six months from the time the nomination was made.

"Project Interchange"

LAMP has recently initiated a program called "Project Interchange." The goal of this program is to promote the use of *preventive law* efforts in legal assistance offices (*see* AR 600–14), to facilitate the exchange of informational handouts on preventive law, and to encourage the development of additional preventive law materials by legal assistance offices, local bar associations and state bar military law committees.

Military legal assistance officers have a potential clientel of over nine million people. Many states and installations have developed excellent handout materials on the rights of servicemembers, state and federal laws effecting service personnel and their family members, and tips on avoiding legal problems. Through "Project Interchange," the LAMP Committee hopes to provide a clearinghouse resource for crossfeed and exchange of information concerning these pamphlets and brochures. The text of a recent LAMP Committee letter to state bar and bar association presidents is at figure 1. At figure 2 "Resource Worksheet #1," which details a number of pamphlets and brochures that are currently available. For further information, contact LAMP Committee Member, Mark E. Sullivan, at 1306 Hillsborough Street, Raleigh, North Carolina 27605.

TO: State Bar Military Law Committees

FROM: Mark E. Sullivan, Committee Member
ABA Standing Committee on Legal Assistance
for Military Personnel (LAMP)

SUBJECT: Request for Information for "Project Interchange"

DATE: July 29, 1985

The ABA LAMP Committee is collecting and disseminating information, pamphlets and other materials on the delivery of legal services to military clients and family members. Our purpose is to set up a clearinghouse for the sharing of ideas, resources, hand-outs and other documents that can be used by the lawyer in uniform who provides legal assistance. The interchange of ideas and materials can also assist military law committees in other states in the development of similar projects. We call this "Project Interchange."

The materials we are collecting are widely varied. They include, for example:

-- Handouts and brochures prepared by military lawyers for their clients (and potential clients) on wills, family law, finding a lawyer and other topics;

-- State seminar outlines, including topics, speakers and materials at courses taught for military lawyers in several states;

-- Newsletters distributed to legal assistance officers by the state bar or bar association dealing with recent case developments, current activities of the military law committee, and materials and resources available to the legal assistance officer;

-- Speeches and presentations for military audiences on preventive law, legal services in the military and legal assistance topics such as divorce, leases, warranties and wills;

-- Pamphlets prepared by military law committees and state bar associations on such topics as veterans' rights and laws of the state affecting military personnel; and

-- Legal assistance handbooks prepared by military lawyers to summarize state laws regarding car registration, voting rights, consumer protection and other topics of interest to military and retired personnel and their families.

The list could go on and on. We want to find out about your projects, ideas and resources so we can spread the word! In addition, we want to pass on suggestions and projects for other state bars and military law committees on improving present programs or facilitating new ones. Plagiarism is the sincerest form of flattery; don't re-invent the wheel! If it's been done once elsewhere, you can take it, study and refine it, and adapt it for your own state with a minimum of extra effort.

We've already collected a list of some of the most useful material available in this field. This is called "Resource Worksheet #1," and a copy is attached to this letter for your review and use. It contains the names of pamphlets, brochures and handouts that cover legal assistance subjects and are available through state bars and bar associations, the ABA, federal agencies and military installations.

It's very important to update this list regularly to keep it current. If you know of any additions (or deletions) for this Worksheet, please send them along.

At the same time, we need to find out more about your projects and resources for military personnel. Please let us know what your military law committee is doing--newsletters, seminars, brochures, etc.--so we can tell the other states.

Our goal in "Project Interchange" is to strengthen and improve military law committees by cross-fertilization of ideas and the exchange of projects, ideas and resources. We need your ideas and assistance.

Figure 1. Text of LAMP committee letter

The LAMP Committee hopes to establish and maintain a close and cooperative relationship with your military law committees. I look forward to receiving your reply.

Very truly yours,

Mark E. Sullivan
Committee Member

Figure 1. Text of LAMP committee letter—Continued

SUBJECT: Client Information Pamphlets

FROM: Mark E. Sullivan, Member, LAMP Committee

A large number of useful pamphlets are available to military attorneys for help in answering general questions of the legal assistance client. Many are printed by the various state bars and bar associations, and some are prepared by military installations for assistance to clients assigned to that post or base. Typical subjects covered include used car warranties, leases, wills, divorce procedures, separation agreements and adoption.

A partial list of these resources is as follows:

1. American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611.

a. General pamphlets--When to See a Lawyer; Counseling Older Clients.

b. Standing Committee on Lawyer's Title Guaranty Funds--Buying or Selling Your Home.

c. Section of Real Property, Probate and Trust Laws--Planning for Life and Death; Wills--Why You Should Have One and the Lawyer's Role in its Preparation.

d. Division of Communications--Your Rights Over Age 50; Law and Marriage--Your Legal Guide.

e. Department of Public Relations and Information--Your Guide to Consumer Credit and Bankruptcy.

2. Federal Trade Commission, Washington, D.C. 20580 (Various pamphlets and folders on Truth-in-Lending, consumer credit, Fair Credit Reporting Act, debt collection, etc.).

3. Arizona: Office of the Staff Judge Advocate, Luke Air Force Base, Arizona 85309 (Pamphlets on divorce in Arizona, Uniformed Services Former Spouses' Protection Act, courts in Arizona, bankruptcy, powers of attorney, change of name, adoption and probate in Arizona).

4. Connecticut

a. Connecticut Bar Association, 15 Lewis Street, Hartford, CT 06130 (Legal Checklist for Military Personnel).

b. Naval Legal Service Office, Box 10, Naval Submarine Base New London, Groton, CT 06349 (Legal Assistance Guide for Members of the Armed Forces Stationed in Connecticut and Their Dependents).

5. Florida: The Florida Bar, Tallahasse, Florida 32301-8226 (Pamphlets on lawyer referral service, wills, jury service, buying a home, automobile accidents, buying a condominium, rights upon arrest, bankruptcy, witness' rights, law and the courts, rights of senior citizens, guardianship, lawyer grievance procedures, marriage, juvenile arrests, adoption and legal aid).

Figure 2. Resource Worksheet No. 1—for Legal Assistance Officers

6. Kansas: Kansas Bar Association, Post Office Box 1037, Topeka, Kansas 6601 (Pamphlets on buying a home, wills, joint tenancy, auto accidents, choosing a lawyer, probate, jury service, lawyer referral service, prepaid legal services, the court system, and marriage and divorce).

7. New Jersey: New Jersey State Bar Association, 172 West State Street, Trenton, NJ 08608 (Pamphlets on divorce, real estate, choosing a lawyer, wills and no-fault auto insurance).

8. New Hampshire: New Hampshire Bar Association, 18 Centre Street, Concord, New Hampshire 03301 (Pamphlets regarding consumer protection, purchase and sale of homes and other matters).

9. North Carolina

a. North Carolina Academy of Trial Lawyers, Post Office Box 767, Raleigh, NC 27602 (pamphlets on divorce and separation, rights upon arrest, wills, auto accidents, testimony as a witness and child custody/support).

b. The Lawyers of North Carolina, Post Office Box 12806, Raleigh, NC 27605 ("This is the Law" pamphlets on marriage, bankruptcy, buying on time, auto accidents, lawyers' fees, buying a home, landlord-tenant law, jury service, child custody/visitation/support and divorce and separation).

c. Legal Services of North Carolina, Inc., Post Office Box 6505, Raleigh, NC 27628 (pamphlets on rental security deposits and other matters).

d. North Carolina Administrative Office of the Courts, Justice Building, Raleigh, NC 27602 (North Carolina Witness/Victim Court Handbook).

e. Governor's Highway Safety Program, 215 East Lane Street, Raleigh, NC 27601 (The Safe Roads Act of 1983 regarding the state's DWI law).

f. OSJA, HQ, XVIII Airborne Corps and Fort Bragg, Fort Bragg, NC 28307 ("TAKE-1" series on wills, child custody/visitation, support, unmarried couples, separation agreements, divorce and property division).

g. OSJA, HQ, 82d Airborne Division, Fort Bragg, NC 28307 (Paratrooper Pamphlet entitled "Buyer's Guide and Consumer's Survival Kit").

10. Maryland: Maryland State Bar Association, Section on Delivery of Legal Services, Committee on Legal Assistance for Military Personnel, Suite 905, 207 East Redwood Street, Baltimore, Maryland 21202 (Maryland Laws--Legal Checklist for Persons Leaving the Armed Services of the United States).

11. Texas

a. Section on Military Law, State Bar of Texas, Post Office Box 12487, Austin, TX 78711 (Legal Check List for the Men and Women of Texas Entering the Armed Forces of the United States).

b. Texas Young Lawyers Association, Post Office Box 12487, Austin, TX 78711 (Pamphlets on estate taxes, child abuse, patients' rights, law for the clergy, law office computerization, selection of a lawyer, lawyer referral service, small claims court, automobile accidents, wills, rape prevention, womens' legal rights, legal services for middle-income Texans, rights upon arrest, landlord-tenant law, traffic court cases, visas and notaries, juveniles and the law, lawyer grievance procedures, jury service, the Texas Deceptive Trade Practices Act, the courts of Texas, and family violence); the pamphlets on law for the clergy and womens' legal rights are particularly helpful, in that they contain a broad overview of legal subjects under Texas law such as landlord-tenant rights, estates and probate, support, bankruptcy and so on.

c. HQ, III Corps and Fort Hood, Fort Hood, TX 76544 (Handbook of Texas Law for Military Personnel, FH PAM 27-9; Command Information Fact Sheets on used cars and warranties, BAQ for single soldiers, tax-payer assistance, involuntary support allotments, powers of attorney, transfer of motor vehicle titles, how to choose an attorney, motor vehicle liability, personal recognizance bonds, wills and divorce law).

While the answers given in the pamphlets described above are often general in nature, they may be of substantial assistance as a starting point for the legal assistance officer advising his or her client. Usually there is a nominal cost for duplication and mailing of pamphlets. If you know of an additional source of such documents for legal assistance officers, please contact the above so that a revision of this list can be prepared.

Figure 2. Resource Worksheet No. 1—for Legal Assistance Officers—Continued

JAGC Officer Personnel Notes

JAGC Personnel Records Audit

All judge advocates in a career status of Conditional Voluntary Indefinite, Voluntary Indefinite, or Regular Army are reminded to complete the JAGC Personnel Records Audit. Completed audit forms should be returned to HQDA(DAJA–PT) ATTN: Major Gray, Washington, DC 20310–2206, not later than 15 December 1985.

Command and General Staff College Correspondence Course

On 28 September 1985, the Deputy Commandant of the Command and General Staff College (CGSC) approved a proposal by the military law instructor at CGSC to give graduates of the JAGC Resident Graduate Course blanket approval for constructive credit for the following three CGSC correspondence subcourses:

1. Subcourse 915, Military Law;
2. Subcourse 951, Staff Communications; and
3. Subcourse 952, Leadership.

Officers who are enrolled in CGSC by correspondence and desire this credit must submit a request, along with a copy of their Graduate Course diploma, to Commandant, US Army Command and General Staff College, ATTN: Registrar, ATZL–SWE–TM, Fort Leavenworth, KS 66027–6940. This constructive credit is not available for CGSC students enrolled in the USAR School option.

For further information, contact LTC Jonathan P. Tomes, military law instructor, AUTOVON 552–4696.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

USAR Judge Advocate General Officer Vacancy

On 30 April 1986, Brigadier General Daniel W. Fouts will have completed his tenure as Chief Judge, U.S. Army Legal Services Agency (IMA). Nominations for this position are currently being sought. Interested officers should contact ARPERCEN (IRR officers) or their CONUSA SJA office (TPU officers) for additional information.

On-Site Schedule Changes

The dates published in the August 1985 issue of *The Army Lawyer* for the New Orleans, Louisiana, On-Site training program have been changed from 12–13 April 1986 to 26–27 April 1986. The host unit for the On-Site training at San Juan, Puerto Rico has been changed from 7581st USAG to the Puerto Rico Army National Guard.

The location of the Los Angeles, California On-Site has been changed to the Marina del Rey Marriott Inn in Marina del Rey, California. The action officer is now LTC Charles W. Jeglikowski, 4256 Ellenita Avenue, Tarzana, California 91356, (213) 894–4636.

All other published information regarding these three On-Site training programs remains the same.

National Guard Judge Advocates Deploy to Central America

Lieutenant Colonel W. A. Abercrombie
Deputy State Judge Advocate,
Louisiana Army National Guard

From early January through mid-May 1985, approximately 12,000 members of the U.S. Army National Guard from Louisiana, Missouri, Alabama, North Carolina, Wisconsin, Texas, New Jersey, Kentucky, Florida, and Puerto Rico deployed to the Azuero Peninsula in the Republic of Panama for a combined engineer training exercise known as Blazing Trails–85. With the exception of a command and control and logistical organization that remained in-country for the entire five months, most personnel rotated through Panama on two-week annual training cycles. The purpose of the exercise was to obtain a training benefit for the National Guard engineer soldiers while enhancing relations with the Republic of Panama through the building of a much needed road in an isolated mountainous area approximately 150 miles southwest of Panama City. The road now provides approximately twenty-five villages and 5,000 Panamanian residents with better access to farm markets, health care, and larger communities.

The project consisted of forty-two kilometers of road construction extending in a north-south direction with a base camp at each end. The north base camp was headquarters for the Louisiana National Guard engineers and the south base camp for the Missouri engineers. The Alabama National Guard set up a field hospital at each base camp location and there was a logistical support element located outside Panama City near Howard Airbase.

Two National Guard judge advocates were assigned to the task force at all times during the five-month period. A total of sixteen National Guard judge advocates from Louisiana, North Carolina, Missouri, and Wisconsin and the Commonwealth of Puerto Rico participated in the exercise. A judge advocate standard operating procedure was developed which provided an outline for handling the various types of legal problems that were anticipated and surfaced during the conduct of the exercise.

The combined nature of the exercise was consistent with provisions of the Panama Canal Treaty of 1977 which called for coordination and cooperation by U.S. and Panamanian military forces in planning and conducting military exercises in Panama. All National Guard personnel were placed on orders pursuant to Title 10 of the U.S. Code in accordance with National Guard Bureau policy for personnel serving outside the United States. Accordingly, they were subject to the UCMJ as opposed to their respective state criminal statutes. The combined task force judge advocates coordinated all military justice matters with the SJA, 193rd Inf Bde (Pan), as the task force was under the operational control of that active duty brigade.

Foreign claims, as well as claims originating from U.S. personnel, were handled by the task force, with the ultimate authority for payment resting with the brigade claims office. Procedures were also established and utilized for handling and solving various status of forces problems as well as problems arising under the Panama Canal Treaty.

There was close coordination between the National Guard judge advocates and the judge advocate officers from both the 193rd Inf Bde (Pan) and the United States Southern Command. The active duty judge advocates were extremely helpful in many ways. It was a valuable training experience for all National Guard judge advocates involved. The writer strongly suggests that all reserve component judge advocates participate in exercises outside of CONUS as often as possible. It is the closest possible experience to an actual mobilization.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

December 2-13: 1st Advanced Acquisition Course (5F-F17).

December 16-20: 28th Federal Labor Relations Course (5F-F22).

January 13-17: 1986 Government Contract Law Symposium (5F-F11).

January 21-28 March 1986: 109th Basic Course (5-27-C20).

January 27-31: 16th Criminal Trial Advocacy Course (5F-F32).

February 3-7: 32nd Law of War Workshop (5F-F42).

February 10-14: 82nd Senior Officers Legal Orientation Course (5F-F1).

February 24-7 March 1986: 106th Contract Attorneys Course (5F-F10).

March 10-14: 1st Judge Advocate & Military Operations Seminar (5F-F47).

March 10-14: 10th Admin Law for Military Installations (5F-F24).

March 17-21: 2nd Administration & Law for Legal Clerks (512-71D/20/30).

March 24-28: 18th Legal Assistance Course (5F-F23).

April 1-4: JA USAR Workshop.

April 8-10: 6th Contract Attorneys Workshop (5F-F15).

April 14-18: 83d Senior Officers Legal Orientation Course (5F-F1).

April 21-25: 16th Staff Judge Advocate Course (5F-F52).

April 28-9 May 1986: 107th Contract Attorneys Course (5F-F10).

May 5-9: 29th Federal Labor Relations Course (5F-F22).

May 12-15: 22nd Fiscal Law Course (5F-F12).

May 19-6 June 1986: 29th Military Judge Course (5F-F33).

June 2-6: 84th Senior Officers Legal Orientation Course (5F-F1).

June 10-13: Chief Legal Clerk Workshop (512-71D/71E/40/50).

June 16-27: JATT Team Training.

June 16-27: JAOAC (Phase II).

July 7-11: U.S. Army Claims Service Training Seminar.

July 7-11: 15th Law Office Management Course (7A-713A).

July 14-18: Professional Recruiting Training Seminar.

July 14-18: 33d Law of War Workshop (5F-F42).

July 21-26 September 1986: 110th Basic Course (5-27-C20).

July 28-8 August 1986: 108th Contract Attorneys Course (5F-F10).

August 4-22 May 1987: 35th Graduate Course (5-27-C22).

August 11-15: 10th Criminal Law New Developments Course (5F-F35).

September 8-12: 85th Senior Officers Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

February 1986

5–7: FBA, Federal Law Conference, New Orleans, LA.
6–7: PLI, Creative Financing, New York, NY.
6–10: NELI, Employment Law Briefing, Maui, HI.
7: SBA, Personal Injury Under $50,000, Phoenix, AZ.
9–13: NCDA, Experienced Prosecutor, Hilton Head, SC.
10–14: GCP, Administration of Government Contracts, Washington, D.C.
13–14: PLI, Distribution & Marketing, San Francisco, CA.
13–14: PLI, Income Taxation of Estates & Trusts, New York, NY.
13–14: PLI, Preparation of Annual Disclosure Documents, San Francisco, CA.
13–15: ALIABA, Environmental Law, Washington, DC.
14: SBA, Personal Injury Under $50,000, Tucson, AZ.
14: MSBA, Personal Injury, Lewistown, ME.
14–15: KCLE, Securities Law, Lexington, KY.
20–21: PLI, Tax Aspects of New Financial Instruments, San Francisco, CA.
20–21: PLI, Tax Exempt Financing, New York, NY.
21–22: SBA, Bankruptcy 1986, Phoenix, AZ.
23–27: NCDA, Forensic Evidence, Williamsburg, VA.
24–25: PLI, Real Estate Development & Construction Financing, Miami, FL.
24–26: NELI, Employment Law Litigation, San Francisco, CA.
28: KCLE, Evidence & Trial Practice, Louisville, KY.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the October 1985 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Vermont	1 June every other year
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the August 1985 issue of The Army Lawyer.

Current Material of Interest

1. Army Law Library Service Answering Machine

The Army Law Library Service (ALLS) at TJAGSA now has a telephone answering machine. To reach ALLS, call (804) 293–4382 or FTS 938–1208. The AUTOVON switchboard in Charlottesville (274–7110) only operates during normal duty hours.

When calling, leave your name, ALLS library number, a telephone number, and your message. While this service is designed primarily for Army law libraries in distant time zones, it is available to all ALLS member libraries.

2. Developments, Doctrine & Literature Department Answering Machine

The Developments, Doctrine & Literature Department (DDL) at TJAGSA also has a telephone answering machine. DDL includes combat developments, *Military Law Review,* and *The Army Lawyer.* To reach DDL, call (804) 293–4668 or FTS 938–1394. The AUTOVON switchboard in Charlottesville (274–7110) only operates during normal duty hours.

When calling, leave your name, phone number, and your message.

3. TJAGSA Publications Available Through DTIC

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

Contract Law

AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).
AD B078095	Fiscal Law Deskbook/JAGS–ADK–83–1 (230 pgs).

Legal Assistance

AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–84–1 (266 pgs).
AD B077739	All States Consumer Law Guide/ JAGS–ADA–83–1 (379 pgs).
AD B089093	LAO Federal Income Tax Supplement/ JAGS–ADA–85–1 (129 pgs).
AD B077738	All States Will Guide/JAGS–ADA–83–2 (202 pgs).

AD B080900 All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).
AD B089092 All-States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).
AD B093771 All-States Law Summary, Vol I/ JAGS-ADA-85-7 (355 pgs).
AD-B094235 All-States Law Summary, Vol II/ JAGS-ADA-85-8 (329 pgs).
AD B090988 Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).
AD B090989 Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128 USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).

Claims

AD B087847 Claims Programmed Text/ JAGS-ADA-84-4 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-84-6 (39 pgs).
AD B087848 Military Aid to Law Enforcement/ JAGS-ADA-81-7 (76 pgs).
AD B087774 Government Information Practices/ JAGS-ADA-84-8 (301 pgs).
AD B087746 Law of Military Installations/ JAGS-ADA-84-9 (268 pgs).
AD B087850 Defensive Federal Litigation/ JAGS-ADA-84-10 (252 pgs).
AD B087745 Reports of Survey and Line of Duty Determination/JAGS-ADA-84-13 (78 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).
AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).
AD B088204 Uniform System of Military Citation/ JAGS-DD-84-2 (38 pgs).

Criminal Law

AD B086941 Criminal Law, Procedure, Pretrial Process/JAGS-ADC-84-1 (150 pgs).
AD B086940 Criminal Law, Procedure, Trial/ JAGS-ADC-84-2 (100 pgs).
AD B086939 Criminal Law, Procedure, Posttrial/ JAGS-ADC-84-3 (80 pgs).
AD B086938 Criminal Law, Crimes & Defenses/ JAGS-ADC-84-4 (180 pgs).
AD B086937 Criminal Law, Evidence/ JAGS-ADC-84-5 (90 pgs).
AD B086936 Criminal Law, Constitutional Evidence/ JAGS-ADC-84-6 (200 pgs).
AD B086935 Criminal Law, Index/JAGS-ADC-84-7 (75 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

4. Regulations & Pamphlets

Number	Title	Change	Date
AR 600-20	Army Command Policy and Procedure	905	26 Aug 85
AR 635-100	Personnel Separations Officer Personnel	910	3 Sep 85
DA Pam 310-1	Index of Blank Forms and Army Publications		1 Sep 85
UPDATE #4	Finance UPDATE		20 Sep 85
UPDATE #6	All Ranks Personnel UPDATE		1 Oct 85

5. Articles

Bronner, *The Wraparound Mortgage: Its Structure, Uses, and Limitations,* 12 J. Real Est. Tax'n 315 (1985).
Burger, *The Need for Change in Prisons and the Correctional System,* 38 Ark. L. Rev. 711 (1985).
Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce,* 83 Mich. L. Rev. 472 (1984).
Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights,* 83 Mich. L. Rev. 1 (1984).
Churchwell, *The Federal Antitrust Implications of Local Rent Control: A Plaintiff's Primer,* 12 Pepperdine L. Rev. 919 (1985).
Fletcher, *A Transaction Theory of Crime?,* 85 Colum. L. Rev. 921 (1985).
Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases,* 53 Geo. Wash. L. Rev. 1 (1984-85).
Hoffer, *The General's Lawyer Is Not Always Right,* 12 Barrister Mag. 16 (Spring 1985).
Mandell & Richardson, *Surgical Search: Removing a Scar on the Fourth Amendment,* 75 J. Crim. L. & Criminology 525 (1984).
Mariner & McArdle, *Consent Forms, Readability, and Comprehension: The Need for New Assessment Tools,* 13 Law, Med. & Health Care 68 (1985).
Mobilia, *Ante-nuptial Agreements Anticipating Divorce: How Effective Are They?,* 70 Mass. L. Rev. 82 (1985).
Murphy, *Previous Consistent and Inconsistent Statements: A Proposal to Make Life Easier for Juries,* Crim. L. Rev., May 1985, at 270.
Nelson & Whitmen, *Installment Land Contracts—The National Scene Revisited,* 1985 B.Y.U.L. Rev. 1 (1985).

Perry & Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys,* 18 Creighton L. Rev. 1369 (1984–85).
Ratner, *The Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements,* 10 Yale J. Int'l L. 59 (1984).
Reisman, *International Incidents: Introduction to a New Genre in International Law,* 10 Yale J. Int'l L. 1 (1984).
Routh, *Liabilities of Tax Preparers: An Overview,* 34 Def. L.J. 497 (1985).
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*U.S. GOVERNMENT PRINTING OFFICE: 1985-490-999:40065

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